Minority Rights Discourse in India

I. P. Massey

I.I.A.S.

Minority Rights Discourse in India is a monograph prepared by the author during his stay at the Indian Institute of Advanced Study, Shimla as its Fellow. Minority discourse at the national and international level is a wide discourse but the present study concentrates mainly on constitutional cultural and educational Rights of Minorities in India besides conceptual articulations of minority rights in general.

Besides an elaborate Exodium, the book is divided in six chapters. In the first chapter concepts of minority, minority formation and minority rights have been focused. Second chapter analyses minority rights under international law. Constitutional vision and minority forms the corpus of the third chapter. Last two chapters mainly concentrate on judicial response to various aspects of cultural and educational rights of the minorities in India. All those interested in minority rights discourse will find this thought-provoking book.

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Foreword

Minority rights have gained greater visibility and relevance all over the world. India is no exception to it being a multi-ethnic, multi-religious, multi-linguistic and multi-cultural society. Diversity of all types is the very soul of India. It is in this context that minority rights have assumed added significance in post-independent India.

The present monograph is the product of the fellowship of Professor I.P. Massey who worked at the Institute from the year 1996 to 1999. He has analysed various aspects of the minority rights in India, especially their content, their dialectics, and their dynamism. Professor Massey has substantiated his discourse by correlating facts with legal cases.

I felicitate Professor Massey for this stimulating analysis. I am sure that this significant study on minority rights would be welcomed by interested sections of society.

V.C. Srivastava
Director

Simla
October 18, 2001

Preface

It is a curious fact that the world of today is made up of small number of states and a large number of minority groups. Like many countries India is also a multi-ethnic society but her diversity is unmatched in the world in terms of her uniqueness and extent. Uniqueness of Indian diversity lies in the fact that there is no majority community. In a sense it is a land of minorities. Majority community is also divided in small groups based on religion, culture, language and region. It is for this reason that at times even majority community suffers from same insecurities with which minorities suffer and starts talking of one religion, one language and one culture. Certainly when majority becomes anxious minorities become uneasy.

In this context Minority Rights Discourse assumes significance. Any Minority Rights Discourse presents questions of complicated concepts, logic, law and facts and India is no exception to this phenomenon. This discourse has always remained in high social visibility area since independence, therefore, deserved fresh inquiry after fifty years of India's independence.

In this work attention has been focused not only on the contents of minority rights but also on the dialectics of minority rights and the dynamics of society reflected in Constitutional vision.

I express my profound gratitude to Professor Mrinal Miri, former Director of the Institute for providing me an opportunity to undertake this study. My warmest thanks also go to Professor V.C. Srivastava, present Director of the Institute for his continued interest in its publication and I am sure that without Professor Srivastava's help and encouragement this work could not have seen the light of the day. I also express my appreciation to all the fellows and officers of the Institute who made my stay academically rewarding and helped me in the publication of this volume.

I.P. MASSEY

October 15, 2001

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CHAPTER 1

Exodium

"A Civilization can be judged by the way a society treats its minorities"

—Mahatma Gandhi

Any minority rights discourse presents questions of complicated concepts, logic and law. Today, the world is made up of relatively small number of states and a large number of minority groups distinguished by their race, culture, language or religious characteristics.[1] Like most countries of the world India is also a multi-ethnic State but the vastness of India's diversity cannot be matched by any other country of the world. In one sense India is a land of minorities. Curious fact is that even the majority group is not homogeneous. Like other minorities it is also divided into numerous groups on the basis of language, culture, race and religious faith, belief and practice.[2] It is for this reason that occasionally majority also suffers from the same insecurities—social, economic, religious and political—with which minorities generally suffer. This, at times, makes majority anxious which in turn makes minorities uneasy.

Ethnicity is a by-product of a historical process. Minorities may come into existence either as a result of conquest and subjugation or breakup of a multi-national empire or the process of amalgamation or political, social and economic inequalities or integration of ethnic groups or immigration or combination of these various factors.[3] In India minority environment is the combination of these factors. Minority groups are not eternal entities but changing dynamic social units that may emerge, metamorphose and disappear over time according to historical circumstances.[4]

Today there has been a resurgence of demands by minority groups the world over, who do not control the power of the state and therefore, increasing militancy of social and economic movements. However, this does not mean that every minority demand has to be necessarily conflictive. In plural societies where effective mechanisms for constructive association, co-existence, interest articulation and potential conflict management exist minority problems do not tend to become conflictive.[5]

Nevertheless, the problem of minorities in the sense it is commonly understood, is a by-product of a democratic process because all totalitarian regimes always enforce uniformity and homogeneity. One of the basic bricks of any democratic society is equal concern for all. Therefore, consciousness of the problem of minorities in a democratic system is basically an expression of this equal concern. This is the reason that plural societies have better chances of survival than monolithic societies. One condition for the survival of a monolithic society is its isolation from other societies which in the present century is not possible because super highways of information and transport have transformed the world into a global village. This points to the fact that only plural societies enjoy a better chance of survival. If Indian civilization could survive the various onslaughts it is only because of its pluralism.[6]

Ethnic diversity is always considered a source of strength of any democratic society which believes in diversity of belief, thought and action. This diversity in any period of crisis produces diverse responses which often lead to mature balanced actions. It is because of this reason that all monolithic societies have given way to democratic societies.[7] However, this basic diversity must lead to an essential unity of the whole. This phenomenon can be illustrated with a similar phenomenon of nature where all sub-systems of the nature support and replenish the nature. It is in this sense that diversity is always seen as a sign of strength rather than weakness.

Just as there are rights and obligations of individuals so also there are certain rights and duties of communities or groups of individuals. Ordinarily minorities being also made up of citizens would claim no special rights within the state they live in but if minorities are such and so constituted that they would never hope to be changed into majority and so come to power in a democratically governed state they may claim special rights. This makes their problems unique. The distinctive feature of such indelible minorities being racial or religious or lingual or cultural is that they refuse to be absorbed in or assimilated in the majority of the country. Consequently these minorities demand special safeguards to preserve and promote their distinctive characteristics. These demands create, at times, serious internal peace and tranquility problems and at the same time struggle to establish a working democracy.[8]

Minority rights discourse is intensive and extensive both. However, in this work attention has been focused only on India's unique diversity and the claims of nation-building, international and national normative narrations and the constitutional conspectus relating to minority rights. Of late the right of the minorities to establish and administer educational institutions of their own choice has generated extensive debate and the whole matter is pending before a larger bench of the Apex Court. Therefore, this aspect of minority rights forms the core of this work.

The whole concept of minority rights in India is contested on the argument of nation-building through cultural mainstream.[9] Fact remains that threat to nation-building arises not from cultural plurality but from discrimination and prejudice which the collectivities suffer every where in the world and India is no exception. In one sense bogey of threat to nation-building is raised in order to mask the socio-economic discrimination and prejudice and its subtle institutionalization into the systems of governance of state and society.

I have tried to argue that adhering to the concept of pluralism and economic growth with social justice. One can reconcile the apparently irreconcilable arguments of nation-building and minority rights. Unless the goal of socio-economic justice is achieved, individual in his self-interest will find security in collectivities and will not be able of identify himself with the state. Recognition of this fact will be a bold step forward in the direction of any nation-building. During freedom movement nationalism was a political ideology but after independence it is to be viewed in socio-economic terms. It is in this context that.Ambedkar said that all political rhetoric sans social and economic democracy is destained to doom. Without achieving equitable socio-economic integration political integration becomes an illusion. Any sense of belonging amongst the members of any group—may be a family, collectivity, state or international comity is a byproduct of a sense of justice which members of the group entertain.

Collectivities building their identities on religion is undesirable but in the present context there seems to be the only alternative available because identity based on religion has an all India reach and can give collectivity an advantage in number game in order to make itself an effective pressure group to have equitable access to the economic resources of the country. It is only by following the principle of multi-culturalism and equal and equitable access to economic resources that the collectivities based on religion will transform themselves into classes based on common economic interests paving the way for a strong secular nation. Unfortunately, though our constitutional and legal ethos is based on justice—social, economic and political—yet existential realities are opposed to it. Earlier this contradiction is removed better; it is for achieving the goal of nation-building. Furthermore, frameworks must be created and strengthened which allow equitable share to all irrespective of race, religion, language and culture in the decision-making process for the reconstruction of the society.

Indian society is not a product of any revolution or any grand design. It has gradually evolved over the centuries by synthesizing its various and varied contradictions. There seems to be no reason to believe why present contradictions will not be harmonized provided the state honestly moves in the direction set by Constitution which "we the people of India" have given to ourselves and thus have a right to have first charge on the republic.

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CHAPTER 2

Diversity and Nation-building

In almost all the polyethnic states the concept of diversity has always remained in high social visibility area and has generated a hyper-sensitive debate with emotive overtones. Therefore, India is no exception to this phenomenon.

Diversity is a complex term and defies exact definition. Therefore, it is easy to fall into absurd simplification or caricature reality. According to one perception, in its generic sense, diversity means right to be different which is a basic human right of every individual and is based on the principle that every person has his own inherent dignity and worth which must be respected for his own sake.

Diversity is an inherent attribute of democracy without which democracy becomes a hollow and sterile concept. Democracy is about choices which people can make from the available alternatives. It is diversity in terms of religion, language, culture, norms and values which provides these choices. Diversity in any society has never been a sign of weakness, it has always been a source of strength. In times of crisis diverse responses always produce mature actions. History bears witness to the fact that monolithic societies have not survived long and soon lost into the pages of history. It is only the plural societies which last long because diversity is self-sustaining and provides necessary resilience to the society to adjust to the changed circcumstances and to absorb shocks. Diversity also acts as balancing wheels and the society is saved from falling over the edge. Diversity is natural as nature abhors uniformity. It is also a positive concept and a precondition for creativity and reflective thinking. Therefore, any attempt to eliminate diversity is always fraught with danger—nay catastrophe. History bears witness to the fact that the treatment which nation-states gave to their national minorities in Europe triggered two world wars which brought untold misery to the whole humanity. Further, there cannot be anything like permanent majority or minority, let alone in a functioning democracy. Majority and minority are made in relation to issues which are likely to change. It is only the politically manipulative colonial regime which advanced the theory of permanent majority and Minority in India. When Majority and Minority change into classes the myth of Permanent Majority and Minority theory explodes.

Extent of India's Diversity

It is a curious fact that today world is made up of small number of states and a large number of ethnic groups. According to an estimate there are 187 states and about 8,000 ethnic groups based on race, religion, language, and culture. Like most countries of the world India is also a multi-ethnic society but its diversity is unique and unmatched in the World.

Diversity in religious terms is just staggering. Almost all the leading religions of the world are practised in India. According to a survey, major religions practised in India include Hinduism, Islam, Christianity, Sikhism, Buddhism, Jainism, Zorastraism, Judaism, Baha-i-faith in addition to many religious cults and practices. It is estimated that in India Hindu population is 687 millions, Muslim, 100 millions, the second largest population in the World, Christians 19 millions, Sikhs, 16 millions, Buddhists and Jains, 9 millions and Zoroastrians, $^1/_2$ millions. Minority groups based on religions are spread all over India. However, some are concentrated in some states where they constitute political majority, i.e. Sikhs in Punjab and Christians in some of the north-eastern states. In some states though they do not constitute political majority but are politically relevant, i.e. Muslims in Uttar Pradesh and Bihar. Because of this tremendous diversity, India is not identified with any one religion though it is certainly identified with Hindu society and culture. If put in correct perspective term 'Hinduism' or 'Hindu religion' is a misnomer. It is a foreign invention and was coined by Britishers in the sixteenth century to differentiate Hindus from non-Hindus. It is rather a geographical expression and identifies people living in those geographical limits. Hinduism includes, in legal terms, all religions of Indian origin such as Buddhism, Jainism and Sikhism. It cannot, therefore, be over-emphasized that in view of India's diversity any attempt to impose one religion, one language and one culture would put unbearable strain on Indian society which it cannot bear and would collapse under it own weight like a black-hole which is a neutron star that collapses due to its own gravitational force.

In terms of ethnic diversity Indian population mainly consists of Mongoloids, Negroids and Cacacians. Generally speaking overtly there is no race and colour prejudice in India, but there may exist subtle discrimination based on race and colour. However, a typical Indian is associated with a particular physical type. So many a time persons from North-east is passed of as a foreigner and a person from Pakistan, Bangladesh or Sri Lanka as an Indian. According to a 1991 Survey tribal population in India is 68 millions spread over whole of India. However, in three states of North-east they constitute political majority.

Language diversity of India is also unmatched. About 1,600 mother tongues are spoken by one-sixth of the humanity. According to an estimate about 2,200 dialects are spoken in India. Over and above this, Indian constitution recognizes 17 languages as official language.

In terms of cultural diversity, it is said that cultural pattern changes after every 10 km. Culture here does not mean only dress and food-habits but patterns of social relationships, material objects, spiritual values that give meaning and identity to community life and provide resource for solving day-to-day problems of life.

Diversity of Majority

However, in spite of this classical diversity the most important and curious fact of India's diversity is that there is no majority community in India because the majority community is a congrumeration of numerous groups having different deities, theology, scriptures, shrines, rituals and cultures. Thus majority community has religions within religion, cultures within culture, faiths within faith and languages within language. It is for this reason that the majority community in India never developed an exclusive collective consciousness based on religion, language and culture. It is for this reason only that, at times, majority also feels insecure about its religion, language and culture and starts talking about one religion, one language and one culture. Consequently when majority becomes anxious, minorities become uneasy.

Uniqueness of India's Diversity

India's historical cultural and philosophical ethos has always been pluralistic which allowed other to be other. The concept of Dharma which does not mean religion but fundamartals of good living always allowed certain free space to every individual to pursue his own concept of good life, values and norms which he thought necessary for self-actualization and fulfilment of his life. Thus concept of autonomy of the "self" was validated, which believed that there is rational unity in every individual and therefore, he must be left free to pursue his own concept of good life. However, this autonomy of the "self" is not "self-centeredness". It is not limited by strong outer ego boundries. Relation of "self" with "other" is not defensive. It loves the other, desires the other and respects the other. It emphasizes efforts to transcend limitations of our own accidental circumstances to diversity "self" in contact with others to achieve more humanity. The concept that there is only one rational unity in all the individuals and therefore, every one must follow only one value and one norm never found favour in India. Thus Dharma is a multi-dimensional tradition and hence opposed to any linear thought process.

Indian diversity is organic rather than structural. Structural diversity is 1+1+1=3 whereas organic diversity is 1+1+1=1. Organic diversity is like ripples in water which appear to be separate but in fact they are not. If one is disturbed, whole is disturbed or vice-versa. Organic unity is like the unity of subsystems in nature which are though separate but replenish the whole.

In the same manner Indian diversity is not only horizontal but vertical too. It is said that there are not only many Indians in India but many Indias in an Indian also. Thus there is plural in every singular. It is for this reason that not only an individual but collectivities also, though based on religion, race, language and culture, have multiple psyche. In fact India is so many countries packed in one geographical unit.

Another uniqueness of Indian diversity is that collectivities based on race, religion, language and culture are not cohesive and have multiple identities. Boundaries which divide collectivities are fuzzy and not rigid. No collectivity is cohesive in the sense that no group possesses one single identity. Collectivities in India cut religion, language and culture frontiers. Every religious community members visit the shrine of each other and offer prayers. A Muslim from north speaks Urdu while a Muslim from the south speaks his regional language. They also cut across cultural frontier as members of a collectivity always follow local customs and traditions.

On the basis of this unique unmatched diversity it is sometimes said that India is a "great melting pot" but which has always simmered and at times boiled over. The concept of "melting pot" envisages melting of diversity into some kind of uniformity. Idea is that out of this uniformity a phoenix in the shape of a "New Man" who is unidimentional will emerge with a composite culture, values and norms. This idea has not come true and may not even come true. "Composit" can be achieved not by melting diversity but by aggregating diversity. Thus what is to be pursued is not assimilation but integration based on multi-culturalism. Identity is indispensable. Therefore, what is to be removed is prejudice and discrimination.[1]

India's true ethos is "fragment of the whole" where every part has its own value and is necessary to complete the whole. The "melting pot" theory cannot define Indian people. Even the mainstream societies like USA have stopped talking of "melting pot" and are emphasizing multiculturalism. In Europe nation-sates developed out of mono-religious and mono-lingual states whereas India has always been multi-religious and multi-lingual. So it is a far cry to evolve a nation-state out of this diversity. In India the concept of "mainstream" cannot be a mono-religious, lingual and cultural discourse as it is diversity only which can be the mainstream. "Mainstream"discourse is even contested by Sikhs, Jains and Buddhist who want to preserve their separate identity. It appears that the concept of "mainstream culture" has developed as a sort of reaction rather than a result of a positive thinking. Culturocide is a form of genocide which has no place in any civil society.

Reconciling Diversity with Unity

Tagore once said that India's diversity is so loose that sometimes it fosters a sense of feebleness in India's unity. This brings one to the question whether diversity and unity are discreet series or they can also meet at a certain point? It also raises a question whether unity is possible only by suppressing diversity or whether by vigorously pursuing diversity?

It is important to note that during freedom struggle almost all the collectivities except Muslims did not assume saliency, but after independence all minorities, including muslims, willingly threw their lot with the majority and willingly accepted whatever safeguards were provided to them. Parsees and Indian Christians even went to the extent of saying that they do not need any special safeguards. However, thereafter these identities gradually started developing assertive group consciousness. This happened because all collectivities were not allowed reasonable share in the political, economic and social structure of the country. Thus in order to have their share minorities started forming pressure groups and in order to bring compactness in the group they projected their strongest identity, i.e. religion, which alone had a national appeal. After independence because the economic development was slow and deficient. Hence group rivalries to have access to the economic benefits became intense and this fostered strong group consciousness. In spite of legal guarantees, because existential conditions did not exist wherein all could get equal opportunity to participate in the economy and polity of the country, the minority collective consciousness became sharp and assertive.

Furthermore, after independence there was an overpowering zeal of nation-building and strong voices were heard of one religion, one language and one culture. Followers of this concept created a situation in which minorities became uneasy and insecure. Hysteria of super-nationalism was so strong that a certain section of society started advocating that there are no tribes in India, they are a caste of Hindus. This silenced the entire tribal population. In this backdrop ethno-nationalism became an alternative dream as a part of mobilizing electoral support for an area which will be exclusively theirs for their religion, culture and language and also for fighting majority for undoing historical injustice with which minorities suffered. This uneasiness was further exploited by the vested interests within and outside the group for their personal political ends and thus minority consciousness became further entrenched. Classical example is the manner in which Britishers exploited Muslim community which was feeling uneasy and insecure during British rule because of the decline of Muslim aristocracy and marginalization of its language and culture.[2]

Furthermore due to wrong conceptualization of state-group-individual relationship the rise of minority consciousness was dubbed as parochial, anti-national and secessionist which confounded and confused the real issues. Force was considered as the only alternative possible to tackle the situation. This led to further alienation of minorities and consolidation of group consciousness. In post-independence era minority collective mobilization can be categorized as welfarest, isolationist, separatist, and secessionist. Except in the last category minorities did not challenge the constitution or the authority of the government. Major thrust of mobilization was socio-economic injustice. However, even these mobilizations were dubbed as secessionist and dealt with as security problems. This resulted in the alienation of minorities and hardened their collective conscience.[3]

There is no denying the fact that every state has a right to protect its unity and integrity but to treat every collective mobilization, even if welfarist in nature, as secessionist was certainly a mistake and became counter-productive.

Diversity and Nation-building

No plural society can grow without a certain level of cohesion. How it can be achieved, is a matter of debate. In any society cohesion can be brought about by three methods: (i) by interdependence; (ii) by force—moral or physical; (iii) by creating collective consciousness based on certain shared values.[4] In any society a person acts in his best interest. Therefore, if certain values are identified which are in the best interest of every one to follow and such values are nurtured by the state, cohesion in the society can be achieved. One such shared value can be the value which the concept of "open society" represents. Concept of open society represents diversity, economic growth with social justice, rule of law, respect for human rights, non-discrimination and absence of prejudice. If these values are fostered by the state and shared by all cohesion can be achieved.

Cohesion can also be achieved by putting collectivities in correct perspective and context with the state. There can be four possible contexts in which collectivities can be placed in relation to state: (i) Exclusionist, (ii) Hegemonic, (iii) Uniformity and (iv) Plural.[5] If collectivities are placed in plural context with the state, cohesion can be generated. Plural context is one which recognizes diversity and affirms faith in equal nurturing of all groups by giving them equal and equitable share in the socio-economic development of the country. In this context government is seen as a focal point at which diversity converges rather than as a source of power which suppresses diversity.

Fact remains that cohesion in a society is not a by-product of any political process. It cannot be commanded either. It does not also mean loyalty to a government or its ideology. It is a by-product of socio-economic justice and absence of any discrimination and prejudice which gives psychological cohesion to the society.

One must not forget that though India has a rich history of 5000 years, Indian state is just fifty years old. National unity based on pluralism and shared values though may be slow to achieve but it will be strong and lasting. Thus keeping the oneness of India by choice and not by coercion is the legitimate goal to be pursued. Diversity can be both a challenge and an opportunity but unfortunately in India it has been a challenge only. In short, in societies where effective frameworks relating to constructive association, socio-economic and cultural co-existence, interest articulation and conflict management exist identity of collectivities does not pose a problem to any effort at nation-building. Therefore, what is needed is creation of these conditions in the society and a strong cohesive nation will be a natural consequence.

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CHAPTER 3

The Concept of Minority

The term “minority” defies exact definition because no matter enumeration is necessary but not sufficient for defining it. It is for this reason that the question of defining ‘minority’ has always been a hotly contested issue in international and domestic fora.[1]

However, one can describe, if not define, the term by explaining that states are political and legal entities that exercise sovereignty over a specific geographical limit. Nation is a socio-psychological concept-based common ethnic and cultural affinities and shared perceptions of these affinities coupled with political consciousness. Minority groups or collectivities are people who have not achieved such national consciousness but are nevertheless united through race, religion, language or culture of which their members are conscious and which forms the basis of a common identity and distinguishes them from others on that basis. Such collectivities or groups are generally called minorities when they are less numerous than the other groups or when they occupy a subordinate economic, political or special position in the state, or both. Therefore, it is possible to speak of numeral or sociological minorities. There are numerous criteria used in defining and classifying minorities. However, the distinguishing factor is the relationship to the majority or the dominant ethnic group.[2]

According to anthropologists after family minorities as a natural social groupings is an ancient phenomena. Integration in group is generally not biologically or genetically determined. It is a social phenomena. Thus Glazer and Moynihan define minority as a “groups of society characterized by a distinct sense of difference owing to culture and descent—forms of social life that are capable of renewing and transforming themselves.”[3]

In soviet literature "ethnoses" is a social phenomena and covered groupings, large and small. They are however, different from social classes because ethnic groups are essentially, though not exclusively, concerned with cultural matters' symbols, values and issues of self-definition whereas interest groups are organizations which are merely concerned with a common demand. According to Marxist approach minority discrimination is a function of class system. Hence, the rights of minorities are best protected through collective class rights rather than through so-called minority rights.[4]

The criteria used to define, identify and distinguish minorities may vary from case to case, but generally they have to do with language, religion, territory, history, social and political organisation, shared myths and feeling of identity and belonging that Anderson calls 'imagined community.'[5]

Minorities may come into existence either as a result of conquest and subjugation or breakup of a multinational empire or process of amalgamation or integration of ethnic groups or immigration or political, social and economic inequalities or combination of these various factors. In India minority environment is a combination of these various factors. Minority groups are not eternal they are dynamic social units that may emerge, metamorphose and dissolve over a period of time according to changing historical circumstances.

The term "minority" is derived from Latin word "minor" and French word "minorite". The word minor implies less, lessor, smaller, reduced and diminished and the word "minorite" denotes a condition of defeat. Indo-European root of the term "minority" is "mei" which can be used in four different senses: to change, small to fix, and to tie.[6]

When this term "minority" first appeared in the English language (1533) it described either a condition or fact of being smaller, inferior, or subordinate. Later in 1547 this term was used with reference to minors so far as their legal status was concerned. In 1736 the term was used in numerical sense to describe the relationship between larger and smaller groups/values. In 1788 the term was defined in political sense to denote the number of votes cast for a political party. Thus in its earlier usage the term was used both in qualitative or quantitative sense.[7]

In sociological context the term "minority" can be interpreted in terms of social relationship between larger and smaller; superior and inferior; and superordinate and subordinate. This social relationship is based on social ranking or status within a stratified group or society which has become institutionalized and is generally accepted as legitimate. Thus it is within the parameters of a scale of superiority-inferiority-equality that the different meanings of "minority" are derived. There are several characteristics of any given ranking system that can be used to analyse members' positions. Such characteristics may be: (i) the distribution of objective privileges like income, wealth, authority, health, education etc.; (ii) the criteria of rank like family membership, power, authority, possessions, achievements, qualities etc.; (iii) the symbols of rank like life style, clothing, housing, organizational membership, etc. Vertical or horizontal mobility within a society determines the quality and quantity of a minority group in that society. Consequently social relationships which are culture specific and described in various meanings of the term, minorities are those which are formed on the basis of differential status positions, the valuation of persons occupying different status positions and social meanings attributed to them.[8]

The whole concept of "minority" may be based either on primordial or instrumental point of views. Primordial point of view refers to identity and security which a person acquires from his attachment to race, religion, region, language and culture. This perception of identity and security, though natural, but is rooted in non-rational foundations of personality. Instrumental perspective refers to the exploitation of the identity factors by the vested interests which is used as a bargaining process for achieving desired results. As Brass puts it ,"ethnicity is the study of the process by which elites and counter elites within ethnic groups select aspects of the groups' culture attach new values and meaning to them and use them as symbols to mobilize the group to defend its interest and to compete with other groups."[9] In most of the minority groups these two factors are combined. Primordial factors are used to achieve cohesion in the groups and instrumental factors are used for bargaining purposes. For an aggregate of people mere sharing of common primordial perception is not enough in order to qualify for a minority group identity, there must also be an organization and mobilization in the group. Therefore, a minority group may be defined as a self-conscious mobilized group with its own feeling of identity, its own insular contacts, its own history and its separate institutions not shared with the rest of the community.

In a plural society mobilization within a minority group takes place generally under a perception of economic and social insecurity and in order to achieve a fair and equitable share in the scarce resources of the country the group mobilizes itself using primordial markers. This leads to politicization of minority group. The degree of politicization is in direct proportion to the viability of social, economic and political system of the country. This makes any minority group both primordial and modern at the same time.

Boundries of a minority group are generally not fixed by space and time. Such boundries change with a change in the purpose and need of mobilization. Groups often absorb, merge with or merge into other ethnic groups through a process of assimilation. Sometimes too, groups divide or sub-groups reject the wider entity and branch out on their own, through a process of differentiation.[10]

A minority group assumes significance when it moves from its primordial state into a political sphere in order to achieve its objectives by eliminating competing or rival forces. Though reasons of minority conflict are various and varied as such conflicts are space and time specific yet various theoretical interpretations available include modernization, economic colonialism and cultural pluralism.

The concept of minority can also be understood and explained in two alternative ways. One such alternative may be from the point of view of democracy and the other may be from the point of view of nationalism.[11] The democratic notion of minority rests on the rule of preferences. When all the preferences, whether they concern the individual or collective are aggregated and counted, a majority and minority emerges. In this context the idea of permanent majority or minority is relevant as individual preferences continue to change. However, there are two problems endemic to this framework. One, preference of self or collective may shift swiftly and suddenly extreme instability may be created. Second, if the preferences become rigidly entrenched majorities and minorities may be fixed for an indefinite period of time negating the basic principle of democracy. In order to avoid both these consequences countries provide in their Constitutions for some basic features which cannot be changed so that uncertain swing in preferences may be kept under control. Thus constitutional democracies save society from anarchy or despotism of majoritarianism. It is with the idea of keeping trynny of majority under check that constitutional democracies grant minorities some special rights and privileges. In a majoritarian rule no policy can be framed on the basis of preferences of individuals in a group which is numerically less. Therefore, this gives minority groups a sense of insecurity and powerlessness which generates societal tensions. Therefore, it is reasonable, just and equitable in a democracy to grant certain preferences to minority groups on the basis of which some majority policies and programmes must be based and which cannot be violated and transgressed.

From the point of view of nationalism, it is the ascriptive features of groups in a society which determine majority or minority. In this framework distinction between majority and minority is based not on terms of preferences but in terms of special identity constituting features on which groups of individuals are based. Since these ascriptive features are largely inherited than acquired so majority or minority remain more or less fixed though not forever. Such ascriptive features may be race, language, culture and religion etc.

As mentioned earlier the concept of minorities cannot be understood solely on the ground of enumeration alone. Three other features must also be taken into consideration. First, there must be certain identifiable ascribed special features which bind the group together and gives its members a sense of separate identity and it is also identified as such by the majority. Second, the group must feel that these special identity-constituting features could shape the political and social order of the society in which it exist. Thus the groups must be politically relevant and must believe and desire that it can play a role in the determination of general policies and programmes. Third, there must be a perception of disadvantage on the basis of special constitutive features of the group.

Besides 'preference' and 'constitutive features' objective and subjective criteria may also be used to understand the concept of minority.[12] Objective identification criteria of a minority group takes into consideration:

1. group must be numerically less as compared to majority;
2. determination must be based on population of that state;
3. the group must have certain stable constitutive features like race, religion, language or culture;
4. the group must be in a non-dominant position;
5. members must be nationals of that country.

Subjective identification criteria for identifying minority refers to the will of the members of the group to preserve their constitutive features in relation to other members of the society.

Whether minority rights are individual or group rights is a contested issue. While according to one point of view there is a contradiction between the two, but according to other both rights can co-exist. Individual rights are based on the liberal construct of inherent dignity and the worth of an individual while group rights follow a more communitarian concept of right based on identity and survival. Singler is of the view that minority rights are group rights and are claimed by an individual but are asserted as a result of membership in a group that seeks a measure of differential treatment distinct from the majority of the population. Minority rights, besides including entrenched concept of non-discrimination as included in various constitutions, also includes the idea that minority rights include the right to join and leave the group.

Unfortunately in the world of today the concept of minority is being marginalized in the face of powerful theory of globalization which has occupied the center-stage especially in the developing world.

The theory of globalization suggests that in order to achieve economic well-being the developing countries will have to change their traditional values, culture and institutions to conform to western model of market relationship, urbanization, industrial production and political bureaucracy then only they will be able to achieve economic prosperity of the developed countries. Therefore, a shift of loyality from village, tribe, minority group to nation and state is essential. This theory thus rejects emphasis on ethnic diversity in developing countries in favour of a single homogeneous state unit. In this paradigm shift from plural to homogeneous minority groups are bound to be ignored if not completely rejected. Therefore, there is bound to be an attempt to build mono-ethnic nations by denying cultural and linguistic rights to the non-dominant ethnic groups. However, history bears witness to the fact that attempts at homogenization have in the ultimate analysis never succeeded. United Kingdom, Spain and France may be quoted as examples where such attempts have failed.

In nation-states ethnic conflict is the result of identity crisis but in plural societies ethnic conflict is the result of socio-economic inequality, prejudice and discrimination. Therefore, in plural societies social and economic policies of states can ignore minorities only at their peril. One of the myths by which even plural democratic societies have suffered is that in the process of development, modernization and nation-building minority identities and interests will perforce dissolve. However, it has not happened anywhere and ethnic pluralism has become a major issue. Governments have adopted various strategies on this issue which may include neglect, denial, assimilation, ethnocide, genocide, affirmative action, autonomy and self-governance. In democratic countries constitutional and legal arrangements also exist to protect the individual and collective minority rights. However, till today no satisfactory solution has been found to tackle minority problems perhaps because there is no universal solution. It is for this reason that the minority rights issue poses a serious challenge to law makers, social scientists and statesmen. Nevertheless bottom line is ethnopluralism coupled with socio-economic justice.

It is believed that with the end of cold war the era of super power conflict is over. Therefore, now the source of conflict will be the resurgence of hopes and aspirations of the minority groups. Nearer home the violent ethnic conflicts in Sri Lanka and India bring into focus basic structural cleavages in the society not adequately addressed by the political power.

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CHAPTER 4

Minority Rights in International System

Definitional Complexity

In legal context the use of the term "minority" can be traced to the nineteenth century political movement of nationalism and nation-state theory as developed in Europe and understood in the sense of unification and citizenship based upon the common racial, linguistic, cultural, religious and historical ties of persons within the boundries of a state. The problem of minorities within a nation-state was first realised in 1878 when the Berlin Congress was held. The Treaty of Berlin required legal equality for every one within a state irrespective of their religious persuations. Following World War I the problem of national minorities became more serious as many Central and Eastern nationalities found themselves circumscribed by territories and within jurisdictions of nation-states to which they did not belong. It happened due to political territorial rearrangements after the war. In order to tackle hostilities between majority and minority generated by this rearrangement League of Nations came into being. It is against this backdrop that the term "minority" was defined by the League of Nations to refer to only those groups which had been incorporated in new territorial rearrangement. Thus the term 'minority' was defined with reference to nationality and referred to those groups which while occupying same territory had different religion, language, culture, physical features and national self-consciousness.[1]

The primary task of League of Nations was to protect the rights of these national minorities as contained in "Minorities" Treaties. The rights covered by these treaties included local autonomy, political representation, nationality protection, protection of family law or personal status, instruction in minority language at school level, use of minority language in public sphere ,i.e. courts, media etc. and the right to establish and administer educational institutions of their own choice. In order to protect national minorities the right against non-discrimination was also provided. Thus the minority right discourse of the League of Nations was written basically in collectivistic rather in individualistic terms. However, the League of Nations miserably failed in its task because of lack of cooperation from the member nation-states.

World War II proved this fact beyond all reasonable doubt and demonstrated clearly the ineffectiveness of Minority Treaties and the system developed to enforce it. Therefore, with the establishment of the United Nations in 1954 a fresh attempt was made to protect minority rights. However, this time emphasis was not on group rights of the minorities but on international individual human rights. United Nations Charter (1954), Universal Declaration of Human Rights (1948), Convenant on Civil and Political Rights (1966), Convenant on Social, Economic and Cultural Rights (1966) and various other documents dealing with human rights sought to provide protection to minorities through the strategy of non-discrimination right which minorities were to enjoy alongwith the majority. Thus the minority rights discourse of the United Nations was written in individualistic terms. Whenever the minority rights discourse is written in individualistic terms the basic concept had always been the ultimate assimilation of minorities in the main- stream.

Some specialized UN organizations, such as UNESCo and ILO, have emphasised on certain aspects of minority rights relevant in their particular fields. Regional international bodies like the organization of American States, the Organization of African Unity and the European Community have concerned themselves with regional minority groups and their rights.

Over the years it had been realized that minority rights problems and conflicts cannot be treated as purely domestic matter of the concerned states because of international ramifications of such conflicts and problems. The relationship between intra-state minority problems and international relations, in the due course of time, had gained focus of the international community. In the same manner it was also increasingly realized that without the group or collective rights of minorities their survival as a group cannot be guaranteed making individual rights, in the ultimate analysis, meaningless. However, there are still states which deny group rights to minority groups in the name of nation-building. There are still more which consider that the way they deal with minorities within their jurisdiction is solely a domestic matter. It is for this reason, coupled with the problem of enforcement of collective rights of the minorities without the co-operation of sovereign states, that the international community has not been able to recognize collective rights as human rights.[2]

It was in Article 27 of the Covenant on Civil and Political Rights (1966) that a special mention to minority protection was made. Art. 27 provided:

> In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group to enjoy their own culture, to profess and practice their own religion, or to use their own language.

This provision which uses the term 'minorities' served as a guide for defining the term 'minority' and for laying down its scope and ambit. Thus the term was confined to only cultural, religious and linguistic minorities. This excluded various other categories from the concept of minorities. This restrictive use of the term minority was resorted to keeping in view the immediate purpose which was sought to be achieved—international peace and security. In this manner the definition of the term 'minority' was merely relational and contextual.

The term 'minority' is still being debated at various international fora but still its differential relational aspect in a stratified social system eludes us. In this context reference may be made to the proposed definition by Francesco Capotorti:

> Groups numerically inferior to the rest of the population of a state, in a non-dominant position, whose members—being nationals of a state—possess ethnic, religious or linguistic characteristics differing from those of the rest of the population

and show if only implicitly a sense of solidarity, directed towards preserving their cultural traditions, religion, or language.

By restricting the term "minority" to statistical quantity makes the concept of minority inoperative in International Law. This statistical element would preclude more groups from minority consideration than excluded by the Art. 27 of the Covenant on Civil and Political Rights.

However, it is gratifying to note that the difficulty in defining the term "minority" in exact terms has not come in the way of drafting and adopting of various international documents on the rights of minorities such as UNESCO Convention against Discrimination in Education, Genocide Convention (1950), International Convention on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief (1981) and Declaration on the Rights of the Indigenous Peoples. This should also include Minorities Declaration of 1992.

Minority Rights and International System

Minority problems cannot be dismissed as merely transitory or minor. History bears witness to the fact that discriminatory treatment given to the minority in any country can be a cause of national and/or international conflict and can even cause large scale war with enormous damage to the life and property. For example the First World War was the result of a minority conflict between the Serbs and the Austrians and Magyer. In the same manner Second World War grew out of a conflict between German minority and the majority in Poland.

League of Nations

Realising the importance of minorities and their rights, the League of Nations made concerted efforts to protect minorities. Woodrow Wilson's proposal to include minority rights including right to self-determination though could not find place in the League Convenant, yet League was given mendate to supervise the implementation of minority treaties arising out of the 1919 Peace Agreements with Eastern European and Balkan States.

The Permanent Court of International Justice also ruled that the provisions regarding minorities safeguards are international obligations and in case of their breach it was the duty of the League Council to take appropriate action. It was further held that these protective minority provisions cannot be changed without the consent of majority of the League Council. In case of breach of their rights minorities had the right to petition to the League. These petitions generally related to educational rights, language rights, agrarian reforms, discrimination, citizenship rights and violence against minority groups etc. However, League of Nations could not do much for the protection of minority rights because of lack of cooperation from the sovereign nation-states who always considered minorities a drag on their efforts at nation building. It was also the view that collective or group rights of the minorities as contained in the peace treaties is in direct opposition of the concept of sovereignty of the states. One can conclude that the protection and promotion of minority rights though under the League of Nations was a step in the right direction, but the foot was not firmly put forward. Therefore, if the story of minority rights under the League was not of success it was not of complete failure either.[3]

United Nations Organization

Difficulties faced by the League of Nations in dealing with the minority rights forced the United Nations to adopt a new strategy in the behalf. This new strategy was the individual human rights approach common to all the people including members of the minority groups. Thus the concept of group or collective rights of minorities was pushed in the background. It was thought that the general non-discrimination and equality clauses would take care of the minority rights also which its members can exercise alongwith the majority.

However, the International Convenant on Civil and Political Rights, 1966 did contain a provision in Article 27 on the rights of the persons belonging to ethnic, religious or linguistic minorities. Art. 27 provided:

> In those states in which ethnic, religious or linguistic minorities

exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

It is significant to note that these rights were given to 'persons' belonging to certain minorities as individual rights and not as collective or group rights. Thus a separate juridical personality to a group of persons belong to 'minority' categorization was denied. It was feared that a separate legal personality to a minority group away from its members would undermine the sovereignty of the state. For this reason words used in Art.27 are "persons belonging to such minorities." Same is the tenor of the Declaration on the Rights of persons belonging to National, Ethnic, Religious and Linguistic Minorities, 1992. Declaration proclaims that rights contained therein belong to 'persons' though may be exercised in community with other members of the group. Thus Article 27 does not provide an effective basis for a system of protection of minority rights.

Opening words of Art. 27 further lay down "In those states in which minorities exist". These words leave the question of defining and identifying minorities to the discretion of the states who have an implied interest in denying the existence of minority groups for various socio-economic and political reasons. States generally consider minority groups a threat to the unity and integrity of the state. States like to think that they are nation-states and thus deny the existence of minority groups within their territories. International community has not developed any valid mechanism for defining and identifying minority groups in a particular country because it is regarded a political matter which can be left to the discretion of states. For example in China, for a people to be labelled a minority group involves a complicated procedure involving linguists, anthropologists, folklorists, government officials and members of the group. It is claimed that in Africa minority groups were the invention of colonial rule or European ethnographers where in fact no such group existed. Therefore, unless a valid international mechanism exists for defining and identifying minorities Art. 27 will remain a weak basis for any effective system for protection and promotion of minorities.

Another significant aspect of minority rights protection through Art. 27 is its negative approach. Article lays down "person belonging to such minorities shall not be denied." These words do not put any mendatory affirmative obligation on states for the protection and promotion of minority rights. States may continue with their assimilationist policies without infringing the provisions of Art.27. It is for this reason that minorities argue that Art.27 does not help them because it does not oblige states to carry out policies favourable to their rights even after they have ratified the Convention.

Furthermore Art.27 makes no mention of national minorities or indigenous peoples. Learning a lesson from the performance of the League of Nations, the United Nation carefully avoided the issue because of the pressure from states where national minorities existed. Indigenous people are outside the scope of Art.27 perhaps because their rights are being separately discussed.[4]

Minorities' main argument against the provisions of Art.27 is that without specific provision obliging states not only to abstain from interfering with the collective rights of the minorities but also to provide affirmative support for the enjoyment of such rights, minority groups will always remain disadvantaged in the society.

Restricted and limited formulation of Art.27 is generally supported on the ground that the general provisions on human right as contained in the Universal Declaration of Human Rights provide enough protection to individuals without regard to their minority status and therefore, no special protective rights are necessary if those rights are effectively protected. However, it is clear that individual universal human rights are not enough as without specific provisions obliging states not only to abstain from interfering with the collective rights of the minorities but also to provide active support for the enjoyment of such rights, minority groups will always be disadvantaged within the wider society. Furthermore, giving states a final say in matters of defining, recognizing and identifying minorities makes the whole system relating to the protection of minorities weak and fragile.[5]

Surprisingly even today many states would like to think themselves as nation-states and therefore, minority groups become uneasy with majority group within their borders. Existence of minority groups, especially national minority groups is considered as a threat of to national sovereignty because of the possibility of a demand for autonomy, self-governance and self-determination. Such groups are also considered a threat to efforts at nation-building. Smaller and weak states feel further threatened because many a times the demands of minority groups are manipulated by outside powers for their own political gains.

Because of the negative posture taken by many states, for whatever reason, minorities are increasingly looking towards international community for the protection when their basic human rights qua collectivity are threatened. It is a fact that minority communities today are under constant pressure from the dominant society and at times not only their cultural survival but even their existence is endangered.[6] Art.27 does not solve the problem of "Cultural genocide" which many states follow in the name of nation-building. Art II of the Convention on Prevention and Punishment of Crime of Genocide defines genocide only in physical terms, thus, states are left free to pursue the policies of assimilation by destroying the culture, language and religion of minority groups.

Besides Art. 27 there are other international instruments also which have a bearing on the rights of minorities. Reference may be made to the international Convention on the Elimination of All Forms of Racial Discrimination (1965), the Committee on the Elimination of Racial Discrimination, established by the Convention, the decade for Action to Combat Racism and Racial Discrimination (1973-1983), and the two World Conferences to Combat Racism and Racial Discrimination, held in Geneva in 1978 and 1983, as well as the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion (1972). In one sense these measures are a followup actions of Universal declaration of Human Rights and the International Covenants.

Another set of international norms developed by the international community which have a indirect bearing on the minorities is the principle of self-determination. This right was not mentioned in the Universal Declaration because at that time opinion was not mature enough to consider it a human right. However, in 1952, the General Assembly recognized that "the right of peoples and nations to self-determination is a prerequisite to the full enjoyment of all fundamental human rights."[7]

Furthermore in 1960 United Nations adopted a Declaration on Granting of Independence to Colonial Countries and Peoples which states that:

> All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Declaration further states that the subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights.[8]

Bold step in this direction was taken when the right to self-determination was incorporated in International Convenant on Civil and Political Rights (1966) and International Covenant on Economic, Social and Cultural Rights (1966). These International Covenants proclaimed that "All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." This was a most important step forward because by this measure the right of self-determination which was available to peoples of colonies under foreign occupation was made available to all the peoples as this right was considered a human right belonging to all human persons. Thus according to one interpretation the right to self-determination also belongs to minorities because it is a prerequisite for any meaningful exercise of all other human rights. Now the right of self-determination has same validity and universality as any other human right.[9] However, it is an contested issue and international laywers still argue that the right of self-determination is confined to only colonial peoples. But there are scholars who argue that minorities based on race and religion, under certain circumstances, have right to self-determination. One such situation may be when state does not represent them and discriminates them on the basis of race, religion, or colour. The debate is still going on.[10]

It is true that the right of self-determination belongs to the "peoples" and not "minorities", however, the definition of the term "peoples" has been carefully avoided in the international instruments. But it is clear that "peoples" is a territorial concept and does not apply to minorities because this right cannot be used to undermine the sovereignty, unity and integrity of independent countries. From this it can be concluded that minorities, whatever may be the situation, must find solution of their problems within the state and must take help of the human rights which are the rights of the peoples. If this is the case then minorities have very little to expect from the United Nations.

Even if this position is accepted still one can argue that self-determination is not necessarily to be identified with secession. It may also mean autonomy and self-governance within the state itself. If interpreted in this sense it will have far reaching consequence for minority groups. In India most of the minority collective assertions have been for autonomy only so that their problem of socio-economic exploitation could be tackled. This interpretation will help them to address problems peculiar to them. It is gratifying that India is moving in that direction. It will be a self-defeating proposition that unless minorities take to arms for liberation they should not be considered as 'peoples' entitled to a right of self-determination.

Declaration on Minority Rights (1992)

UN on December 18, 1992 adopted a new Declaration on the rights of persons belonging to national, ethnic, religious and linguistic minorities without vote. This Declaration provides:

1. State shall, through appropriate legislative and other measures, protect the existence and encourage conditions for the promotion of identity of minorities. Rights given in the Declaration can be exercised either individually as well as in community without discrimination.

2. Minorities shall have the right to enjoy their culture, to profess and practice their own religion and use their own language in private and public without discrimination except where specific practices are contrary to national and international standards. States are also obliged to create adequate opportunities to provide instructions in their mother tongue and also to encourage education in order to develop knowledge of their history, tradition, language and culture.
3. Person belonging to minorities shall have the right to participate effectively in cultural, religious, social, economic and public life.
4. Minorities will have right, compatible with national legislation, to participate effectively in national or regional decision- making process on matters that concern them.
5. Persons belonging to minorities shall have right to establish and maintain their own associations.
6. Persons belonging to minorities will have free and peaceful contacts with their counterparts within or outside the country.
7. States should cooperate in promoting and developing respect for the rights of the minorities and take appropriate measures so that persons belonging to minorities may participate fully in the economic progress and development of the country.

Though it may be said that Declaration is an improvement on Art.27 yet fails to fully meet the aspirations of the minorities. The focus is still on the states. Act.8 clause 4 makes it clear when it provides that nothing in the Declaration may be construed as permitting any activity contrary to sovereign equality, territorial integrity and political independence of states. Declaration also fails in providing legal status to minority groups. Declaration provides clearly that these are the rights of 'persons' which may be exercised in community with other members of the group. Nevertheless 1992 Declaration may be considered as a step in the transition from individual to collective rights and from negative to affirmative approach so far as the rights of the minorities are concerned. It may help prevent ethnocidal and assimilationist policies of the governments to some extent. International normative narrations of minority rights may be just straws but the satisfaction is that they are floating in the right direction.

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CHAPTER 5

Minority Rights: Constitutional Vision

When India became independent after its division on religious lines, religious minorities became very apprehensive of their identity. According to a survey at that time there were 10.69% Muslims, 2.45 per cent Christians, 1.79 per cent Sikhs and considerable number of Budhists, Parsees and Jains. Therefore, the main problem before the drafters of the Constitution was, as Nehru put it, "How to maintain the unity of India without losing its rich diversity". This aim was achieved by making secularism and minority rights cornerstone of the Constitution.[1]

Minority Rights were protected by two strategies—1.negative 2. positive. Negative strategy was aimed at protecting the minorities from governmental discrimination on the basis of their minority characters. Therefore, non-discrimination and equality clause were provided in the Constitution to protect minorities against any possible discrimination. These rights included: 1. Equality before law (Art. 14), 2. Prohibition of discrimination on grounds of religion, race, caste, sex etc. (Art. 15), 3. Equality of opportunities in public employment (Art. 16), 4. Right to six freedoms (Art. 19), 5. Right to free profession, practice and prorogation of religion (Art. 25), and 6. Freedom to manage religious affairs (Art. 26). These rights are individual rights and are available to any member of a minority community along with the rest of the people.[2]

The other strategy, positive in nature, included collective rights which are available to minorities as groups/communities. These rights were designed to allow minorities to preserve their language, religion and culture. These rights are grouped under

"Cultural and Educational Rights" (Arts. 29 and 30). These articles contain provisions to provide cultural and lingual autonomy to minorities in India. These Articles provide:

1. *Protection of interests of minorities*: Any section of the citizens residing in the territory of India or any part thereof having distinct language, script or culture of its own shall have the right to conserve the same.

(2) No citizen shall be denied admission into any educational institution maintained by the state or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them. (Art. 29).

2. *Right of minorities to establish and administer educational institutions*: (1) All minorities, whether based on religion or language shall have the right to establish and administer educational institutions of their choice.

(1A) In making any law providing for the compulsory acquisition of any property of an educational establishment and administered by a minority, referred to in clause (1) the state shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.

[added by the Constitution
(Forty-fourth Amendment) Act, 1978]

(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language. (Art.30).

Individual/Collective Rights or Group Rights

The rights of the minorities contained in the above-mentioned Articles are group/collective rights. This very concept of allowing minority groups collective rights is a high watermark of Nehruvian Constitutional vision. At a time when even international community was struggling to grapple with the problem whether minorities be provided any collective/group rights, framers of the Indian Constitution granted collective rights to minorities.

Group/collective rights are something more than, or other than, the common rights of citizenship. Group rights may be of two types:

1. Positive 2. Negative.

Positive group rights are those rights which intend to protect minorities against external dissent to their separate identity and negative rights are those which protect group from internal disent. Thus positive group rights refer to inter-group relationship and negative group rights refer to intra-group relationship to the exclusion of any judicial review and fundamental rights of the individual. Uniqueness of Nehruvian constitutional vision lies in the fact that while the constitution granted positive group rights to minorities, negative group rights were carefully avoided.

International community since the Second World War down played the collective rights of the minorities in the UNO system and it was reduced to a question of individual human right. When the Universal Declaration of Human Rights (1948) was being drafted it was thought that there is no need to recognise the collective rights of the minorities as individual equality and non-discrimination clauses would protect minorities also because minority group members are also citizens.[3] It was argued that equality contains two elements. One, formal legal equality of all human beings before the law. Second, equality of opportunities in terms of social, economic and cultural rights. Non-discrimination aspect of minority rights, in the same manner, implies that no specific or particular groups may be excluded from enjoyment of human rights. From the ideological point of view also the idea of collective rights was opposed. Impressive imposing structures of abstract reasoning were created for opposite purposes. It was argued that the concept of individual human rights is based on the idea of inherent dignity and equality of all individuals. So emphasis on collective rights would treat individuals merely as carrier of group identities and objectives rather than autonomous personalities capable of defining their own identities and goals of life. Thus it will subordinate individual freedom to group claim in the name of protecting traditional culture. Advocates of Statist Theory advocated that only state can have collective rights as it is the guarantor of sovereignty and right and it alone can wield power. Therefore, individuals can be given only individual rights. Even those who supported the classical liberal construct argued that there is a direct relationship between individual and the state. Individual has rights and state has power either to enforce these rights or to provide for them. Thus they denied collective rights to groups. Communist states saw the problems of minorities as part of class struggle which, they argued, can be better solved not by giving collective rights to minorities but by class rights actions. International community saw collective rights of the minorities as something that militates against the concept of nation-state and hampers nation-building efforts of the states. Furthermore, the international community did not want to face the problem which the League of Nations faced and which proved fatal to its existence.[4] However, it was emphasized by the minority groups that collective rights are much more than equality and non-discrimination provisions. Collective rights are necessary if minorities have to maintain their separate identity as groups. Collective rights are also necessary if minorities have to resist effectively margionalization, assimilation and ethnocidal policies of the state. Furthermore, certain rights like cultural and educational rights can be better served and exercised by the groups. It is also argued that collective rights supplement and strengthen human rights by responding to potential injustices that traditional rights doctrine cannot address. Against this backdrop one can appreciate the maturity of Nehru's vision that he did not allow himself to be overwhelmed by the imposing structure of abstract reasoning in international fora against collective rights of the minorities and granted to the minorities group rights based on religion, language and culture. Group rights confer on minorities right to cultural and educational autonomy.

Constitutional Vision of Minority Rights

Even a casual survey of the Constituent Assembly debates and proceedings of the Subcommittee on Minority Rights would clearly indicate that the basic concept behind minority rights was to preserve the rich diversity of India and to give minorities a sense of security and belongingness without which, it was thought, they cannot play their rightful role in the reconstruction of the society.[5] A belief in the secular and plural traditions of India is also clearly reflected. Secularism and pluralism have always been the basic bricks of Indian thought and culture. Pluralism is the keynote of Indian culture and religious tolerance is the bedrock of Indian secularism. The concept of Dharma which represents all life ordering principles emphasised the principle of "allowing others to be others." It also provided for a certain free space to every individual which is necessary for self-actualization and enrichment of life. Nehru was convinced that the growth of civilization and culture lies in extending the outer boundries of this space allotted to an individual/group. These concepts thus provided a philosophical base which shaped constitutional vision in relation to minority rights.

Legitimacy of Minority Rights

On the question of legitimacy of minority rights in the Constitution opinion is sharply divided in two extremes. On one extreme some hold the view that the minority rights are the most secular provisions in a secular constitution.[6] This view is also supported by the various decisions of the Supreme Court which hold that the Indian Constitution is secular but not irreligious and exhibits a catholic approach. Therefore, minorities can be given rights on the basis of religion as religious minorities cannot be treated in a religion-neutral way and a fair deal is possible only on the basis of religion. On the other extreme are those who hold the position that minority rights are the most unsecular provisions in a secular constitution.[7] They argue that these provisions unnecessarily foster a artificial sense of minority-majority divide. They argue further that religion cannot provide a rational basis of classification and hence unconstitutional. Truth lies somewhere between these two extremes. It is not a either or situation. There are various possibilities within these extremes. Fact remains that religion or any other ascriptive trait should not be the basis of any right or classification of people. Such classification becomes suspect. The basis of right must be humanity and universality.

Another dimension of legitimacy discourse is that the rights carry with it duties also. Rights and duties are correlative. The whole situation can be compared with nature which is composed of various sub-systems and these sub-systems exist to replenish and invigorate nature. In the same manner minorities have a responsibility to replenish and enrich society by exercising their rights under Art.29 and 30 of the Constitution.

Uniqueness of the Minority Rights

While most of the rights in the Constitution are couched in the negative, minority rights are laid down in the affirmative. Implications of this are that besides being a limitation on the state, it is an empowerment also. It empowers minority communities based on religion and language to establish educational institutions of their choice to develop their language and culture. Besides this, it also imposes an obligation on the state not to discriminate against minority institutions while providing grant-in-aid and recognition. State also cannot compel students of minority community to attend state schools even in exercise of its obligation under Art.45 of the Constitution mendating free and compulsory education. They have a choice to attend their own schools or the schools of the state. In the same manner state cannot impose a medium of instruction on a minority institution to the total exclusion of its own language.

Another striking uniqueness of minority rights is that while all other rights are limited rights, minority rights are given in absolute terms. However, this does not mean that minority rights are absolute and cannot be regulated by the state. State can still regulate minority rights in exercise of its inherent police powers which is one of the three attributes of any sovereign state.[8] Therefore, state can impose reasonable restrictions while granting financial aid and affiliation necessary in the interest of excellence in the functioning of the institution. However, the core of the power of administration should not be adversely affected.[9] State regulation in order to be valid must, therefore, satisfy the principles of utility, necessity and proportionality.[10]

Certain limitations on the exercise of this right arise from the right itself. If minority has the right to establish and administer a educational ,institution then by implication it has no right to maladministration. In the same manner minority has no right to establish a fake institution.[11]

In 1978 by the 44thAmendment Act an amendment was made in Art.30 of the Constitution and Clause IA was added which empowered the State to acquire the property of a minority educational institution. However, it provided that the amount of compensation given must be such as would not abrogate or restrict the right guaranteed under Art.30.

Whether Art.29(2) cuts down the width of Art.30(1)

Can a minority institution receiving aid from State fund is entitled to accord preference in favour or reserve seats for candidates belonging to its own community on the basis of religion or language had been the most perplexing question within the area of minority rights. This question came before the Supreme Court recently and is now pending decision by an eleven judge bench of the Supreme Court. However, for the present the Supreme Court in *St.Stephen's case* (1992)[12] answered the question in the affirmative and allowed minority institutions to admit students of its own community to the extent of 50 per cent only. This decision has generated a lot of debate.

The mendate of Art.29(2) is that there shall not be any discrimination based on religion, etc., in case of admission of students in educational institutions maintained by the state or receiving aid from state funds. Following its earlier stand the Supreme Court held that Art.29(2) cannot be intended to nullify the special rights guaranteed to minorities in Art.30(1) which gives them the constitutional right to establish and administer their educational institutions of their own choice. The Court observed that the width of Art.30(1) cannot be cut down by the consideration on which Art.29(2) is based. The word 'of their choice' in Art.30(1) leaves vast options to the minorities in selecting the type of educational institutions they wish to establish to conserve their distinct language, script or culture or for imparting secular education.

In order to fortify its conclusion in the case the Supreme Court further argued that Art.29(2) deals with non-discrimination but the general equality by non-discrimination cannot be the only goal of the minorities. The minority rights under the majority rule implies more than non-discrimination because the protection of interests and institutions and advancement of opportunity are also important for minorities. Hence, differential treatment that distinguishes them from the majority is a must to preserve their basic characteristics and this appears to be the main reason for incorporating Art.30(1) in the Constitution as a fundamental right of minorities.

Repelling the main argument of the respondents based on "non-discrimination on grounds of religion" of Art.29(2) and equality in general based on Art.14, the Supreme Court held that in order to treat some persons equally at a time they have to be treated differently, differential treatment in admission process for students of its own community based on religion does not violate Art.29(2) or Art.14. It is a fact that for various reasons the students of minority community cannot compete at par with the rest of the students. However, the Court was quick to add that laws carving out the rights of minorities in Art.30(1) must not be arbitrary, invidious or unjustified; they have to be reasonable and must have a reasonable relation between the aim and the means employed. The individual rights will necessarily have to be balanced with the competing minority interest.

In the same manner, countering the argument of 'secularism' which is the cornerstone of the Indian Constitution, the Supreme Court observed that minorities cannot be treated in a religious neutral way in their educational institutions. Clearly that was not the aim of Art.30(1) as this right was incorporated to secure to the minorities a fair deal in the name of religion only. The Court further observed that the catholic approach that led to the drafting of the constitutional provisions dealing with the minority rights should be maintained and thus nothing is to be done to deprive the minorities of a sense of belonging and a feeling of security.[15]

On the basis of these arguments the majority of the Supreme

Court came to the conclusion that Art.30(1) allows minority institutions receiving aid and affiliation from the state to prefer their community candidates in order to maintain the minority character of the institution. However, the Court added that this differential treatment must be in conformity to the university standards and must not exceed 50 per cent of the annual intake in order to maintain a balance between minority and majority rights.[14]

In his dissenting opinion Justice Kasliwal argued that the right guaranteed to the minorities under Art.30(1) to establish and administer their educational institutions is subject to the prohibition of Art.29(2) and therefore, no minority institution can reserve any seat for the member of its own community on the basis of religion. He further built his arguments on the basis of "secularism" and "equality clause" being the basic bricks of the Constitution.[15]

This decision of the Supreme Court has now been again reopened in T.M.A.Pai Foundation (II) case (1993). Reopened case was being heard by a Bench of seven judges when abruptly on February 8, 1997 it decided to request the Chief Justice to refer the matter to a larger bench of eleven judges. This merely shows the complexities involved in the whole issue of minority rights under Art.30(1).

Those who disagree with the majority decision in St.Stephen's case argue: 1. article 30(1) intends to protect minorities against invasion of their right to establish and administer educational institutions of their own choice and therefore, it cannot be converted into a weapon to exact unjustifiable preferential or discriminatory treatment for minority institutions so as to obtain the benefit and to reject the obligation of statutory rights; 2. the right of the minorities under Art.30(1) is also subject to the right of a citizen not to be denied admission on grounds only of religion, race, caste, language or any of them; 3. Indian Constitution sets up a secular state and a secular state is incompatible with communal educational institutions. Merely because a person does not belong to the community which founded the institution so he cannot get admission sounds unsecular when the institution is receiving aid from state funds.

The right of the citizen arises by virtue of the fact that it is the state funds that are helping to maintain the educational institution. Therefore, it cannot refuse admission on the grounds of religion, race, caste or language; 4. the minority rights mentioned in Articles 29 and 30 have been conferred on the minorities in the hope that they may not feel isolated and separate and that in the due course of time they will assimilate themselves with the majority. The law that allows minorities to deny admission to other students on the ground of religion would certainly obstruct this process.[15] Such an argument is also generally supported by the observation of Sardar Patel who said, "In the long run, it would be in the interest of all to forget that there is anything like majority and minority in this country and (to realize) that there is only one community." Fact remains that the idea of 'assimilation' sounds undemocratic and anti-secular and thus goes against the very spirit of the Constitution. Nevertheless, one cannot deny the fact that in any democratic society, "religion" cannot be a valid basis of classifying people for any purpose especially for the purpose of admission to educational institutions whether maintained by the state or by the minority communities if institutions receive aid from the State.

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CHAPTER 6

Minority Cultural and Educational Rights: Constitutional Conspectus-I

Definitional Complexity

A plain reading of Art.30(1) shows that the right contained therein can be claimed only by a "minority". However, it is a curious constitutional fact that the term 'minority' has not been defined in the Constitution. One thing is certain that the term 'minority' must be defined against the backdrop of Art.30(1) itself. If so defined two elements become clear:

1. Minority must be religious or linguistic.
2. It must be numerically less than 50%.

However, while the first element is clear, second element poses a question ,i.e. 50 per cent of what? Is it 50 per cent of the entire population of India or 50 per cent of the population of the state or 50 per cent of the population of the municipal jurisdiction or any part thereof? The Apex Court has answered the question by holding that "less than 50 per cent" must be determined in relation to the jurisdictional reach of a particular legislation which is sought to be impugned, namely, that if it is a state legislation then the minorities will have to be determined in relation to the population of that state and if it is a central legislation then it must be determined with reference to the population of the whole country. The Court rejected the "Unit or Region Test" in order to determine a "minority".

A little reflection would show that the "Unit or Region Test" would have created complications. Problem would have been that where the line was to be drawn and which "unit" is to be taken into consideration because a unit may be a district or a sub-division thereof or a town or its suburb or a municipality or its ward. Furthermore, 'unit or region test' would have led to illogical conclusions also. It is well known that in many towns persons belonging to a particular community flock together in a suburb of a town or a ward of the municipality and thus they may constitute majority there. Hence they may not be entitled to the benefit of Art.30(1). On the other hand, some members of the same community may live in certain areas where they may be in minority and thus entitled to the protection of Art.30(1).

However, the test approved by the Supreme Court, i.e. 'Legislative Jurisdiction Test' is also not without difficulty. Under this test some members of a community in one state may claim protection of Art.30(1) whereas, other members of the same community in other state may not claim such protection for their educational institutions. It is not uncommon for minority communities to have a chain of educational institutions spread all over the country. If the above test is taken as the basis to determine 'minority' then only some institutions in some states where that community is in minority will be able to receive the benefit of Art.30(1). It is no denying the fact that the spirit of Art.30(1) is that all minority educational institutions, no matter where they may be, must receive protection. Furthermore, the test laid down will bring an element of duality and would divide a minority as a state or national minority.

A close scrutiny of the Constituent Assembly Debates clearly demonstrate that by using the word 'minority' in Art.30(1) drafters had in mind only the national minorities such as Muslims, Sikhs, Christians, Parsees and Anglo-Indians. Therefore, it is suggested that where a group is a minority in the historical or national context and its claim is based on religion or language it must be defined and ascertained in terms of population of the whole country, irrespective of its being in numerical majority in any particular state. Unless it is done it will not reflect the true spirit and intent of the Constitution.[1]

All this only goes to show that even after fifty years of the working of the Indian Constitution the term "minority" has not been satisfactorily defined. It will be now for an 11-judge Supreme Court Bench to define the term "minority" in the absence of any earlier pronouncement on the core issue, the basis of five day long inconclusive hearing by a Constitution Bench of a batch of petitions by minority professional institutions (February-1997).[2] The hearing of the petitions by a seven-judge bench headed by Justice M.M.Punchhi came to an abrupt end when the court felt that further arguments should wait until a pronouncement is made on "what constitutes a minority?" by a 11-judge Bench. Justice Punchhi said since there were already judgments on this questions—one by a seven-judge bench in the St.Xavier case[3] and the other by a 9-judge bench in Kerala Education Bill case[4]—the present petition by T.M.A.Pai Foundation and other private minority professional educational institutions must be heard and settled by an 11-judge Bench. Earlier to these two judgements, there was 42nd Constitutional Amendment and the Arya Samaj case[5] verdict in which the state was empowered to decide who and which institution deserved to be called a "minority educational institution". The basis of the opinion was that despite the two authoritative verdicts on the core question, "pin pricks" had continued over the issue since 1973. Therefore, it would be better that the matter be referred to a larger bench. The key issue which will now be decided by the 11-judge Bench will be that what is the meaning and content of the expression "minority" in Art. 30 of the Constitution. The bench will also decide the meaning of the expression "minority educational institution" and what should be the indices to determine whether an educational institution is a minority educational institution? This clearly demonstrates that the expression "minority" is not merely a legal expression but has socio-political overtones. This is a common complexity in international and national normative narratives.

The term "minority" can be defined either narrowly or broadly. Behind a narrow definition the operational concept is "assimilation" and "nation building" while broad approach represents "diversity" and "pluralism'.

Identification of a minority group based on language does not pose any serious problem. Minority referred to in Art.30 must be a minority based or either religion or language; need not be both. Again for the purposes of Art.30(1) a community may constitute a minority based on language, even though it may not have a separate script; it would be enough if they have a separate spoken language.

However, identification of a minority group based on religion is not an easy task because the term "religion" is itself a complex expression. Religion is a system of belief and worship which may be based on the concept of one God and one book or many Gods and Goddesses and many books or there may not be a concept of God at all or it may be belief in some principle, value or norm. The Apex Court recently grappled with this problem in *Bramchari Sidheshwar_Shai V. State of West Bengal.*[6]

What is a minority based on religion

The question involved in this case was whether the followers of Ramakrishna religion were entitled to be treated as minority based on religion and as such entitled to the fundamental right under Art.30(1) of the Constitution of India of establishing and administering educational institutions of their own choice. Case arose out of a writ petition filed by the appellants in the High Court seeking issue of a writ commanding the Government of West Bengal to reconstitute the Governing Body of the Ramakrishna Mission College according to the provisions of West Bengal Act of 1975 and West Bengal Act of 1978. This was resisted by the Ramakrishna Mission on the ground that Ramakrishna Mission is a minority based on religion and hence entitled to the protection of Art.30(1) of the Constitution. Learned Single Judge held that Ramakrishna Mission Colleges are entitled to the protection of Art.30(1) as it is a minority based on religion. The Division Bench expressed its agreement with the learned Single Judge. Thus the appeal before the Supreme Court was made. One of the points for the consideration of the Court was:

> Can the citizen of India residing in the State of West Bengal who are professing practicing a propagating the religious doctrines and teaching of Ramakrishna and have become his followers; claim to belong to a minority based on Ramakrishna religion which was distinct and different from Hindu religion and as such entitled to the fundamental right under Art.30(1)

of the Constitution of India, of establishing and administering educational institutions of their choice?

After referring to its various judgements[7] on the subject and analysing the fundamental philosophy of Hindu and Ramakrishna religions, the Supreme Court came to the conclusion that the citizens of India residing in the State of West Bengal, who are professing, practicing or propagating the religious doctrines and teachings of Ramakrishna and have become his followers, cannot claim to belong to a minority based on Ramakrishna religion which was distinct and different from Hindu religion and as such are not entitled to the fundamental right under Art.30(1) of the Constitution of India, of establishing educational institutions of their choice through Ramakrishna Mission because Ramakrishna religion is not a separate and distinct religion as it is only a part of the whole which is Hindu religion.

Thus, in order to claim a minority status based or religion the group has to satisfy that (i) it is a collection of individuals who have a system of beliefs with regard to their conducive spiritual well-being; (ii) it has a common organization; (iii) it has a definite name; and (iv) its population is less than 50 peer cent of the population of the area to which the law applies.

Minority Rights: Constitutional Narratives

India is a multi-ethnic society having different kinds of minorities. These minorities are based on religion, language, culture, race and socio-economic considerations. However in this study focus of attention are those minorities which are based on religion, language and culture.

Most of the rights contained in International Declaration of Human Rights (1948) are guaranteed under Part III and Part IV of the Indian Constitution. Rights contained in Part III are civil and political rights which are enforceable against the state and the rights contained in Part IV are those social, economic and cultural rights which are to be provided by the state and cannot be enforced against the state unless these rights are translated into statutory rights. However, these rights are fundamental in the governance of the country.[8] Some of these rights which are of contemporary importance have also been transported by the Supreme Court into Part III to make them enforceable against the state.

Art.13 further provides that any law inconsistent with or in derogation of these rights will be void to the extent of its inconsistency. In case of violation of these rights a person can directly move the Supreme Court under Art.32 and the High Court under Art.226 for the vindication of his rights. These provisions empower the court to issue orders, directions and writs for the enforcement of these rights.

By lowering the threshold level of the doctrine of locus standi the court has developed the strategy of Public Interest Litigation (PIL) or Social Action Litigation (SAL) for the protection of the fundamental rights of the people especially those of the weaker sections of the society. In exercise of this power the Apex Court has developed a new Bill of Rights for the people. This has made the Supreme Court of India, as Professor Baxi has put it, a Supreme Court of Indians.[9]

Equality clause or non-discriminatory clause is guaranteed under Art. 14 of the Constitution. Art.15 prohibits discrimination on grounds of religion, caste, creed, language, or place of birth. Art.16 further prohibits discrimination in public employment. Minorities enjoy these rights along with other members of the Majority. Right to freedom of thought, conscience and religion are guaranteed under Articles 25 to 29 of the Constitution. Art.25 guarantees freedom of conscience, free propagation, and free profession and practice of religion. However, Art.25 further provides that state can make law for social reform and welfare or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus. The freedom to manage religious institutions without any payment of taxes is also guaranteed under Art.26. Individuals are guaranteed freedom as to payment of taxes for the promotion of any particular religion (Art.27). However, these rights are subject to considerations of public order, morality and health which are necessary in the interest of general public. Art.28 further prohibits imposition of religious beliefs on the persons attending any educational institution receiving state aid. It further provides that no student can be required to take part in any religious instructions that may be imparted in such an institution recognised by the state or to attend any religious worship that may be conducted in such institution without the consent of the student or his guardian when he is a minor.[10]

Articles 29 and 30 of the Constitution specifically deal with the educational and cultural right of the minorities. Art. 29 guarantees to any section of the citizens having a distinct language, sceipt or culture of its own the right to conserve the same. It further provides that no one can be denied admission into any educational institution maintained by the state or receiving aid/funds from it on the grounds only of religion, race, caste, language etc. Art. 30 guarantees to the minorities based on religion and/or language the right to establish and administer educational institutions of their own choice. State cannot discriminate such minority institution for the purpose of granting recognition or providing aid.[11]

In matters of family relations minorities based on religion are largely left free to be governed by their own personal laws. But in matters of criminal justice they are subject to the law of the land. However, many special laws have been enacted prohibiting religious practices human beings such as prohibition of Sati and Devdasi practices. Indian Penal Code treats offences relating to religion such as injuring or defiling places of worship with an intention to insult the religious feelings of any class. Use of religious places for political purposes and for harboring criminals is also prohibited. Religious organizations are allowed to maintain communications with coreligionists abroad. However, financial contributions from abroad are subject to scrutiny and licencing by the government.

Secularism is the cornerstone of the Indian polity. It is also a fundamental feature of the Indian Constitution. No matter the word 'secularism' was added in the Constitution by the 42nd Amendment of Constitution 1976 it did not mean that the Indian Constitution was not-secular from its very inception. Adding the word 'secular' to the Preamble of the Constitution simply made explicit what was already implicit in the scheme of the Constitution. The forces of secularism are further strengthened by plural and democratic structure of the polity. Values of secularism have been internalized by the Constitution in variety of ways:

1. there will not be any state religion; 2. equal respect for all religions and; neural state action which implies that there will not be any discrimination on the ground of religion and state action will be guided by material well-being and not by religious preferences. These values of the Constitution give a sense of security to the minorities. Supreme Court also is of the view that pluralism is the keynote of the Indian culture and religious tolerance is the bedrock of the Indian secularism. It is based on the belief that all religions are equally good, and efficacious pathways to perfection or God-realization. It stands for a complex interpretative process in which there is a transcendence of religion and yet there is a unification of multiple religions. It is a bridge between religious traditions in a multi-religious society to cross over the barriers of their diversity. Secularism is a basic feature of the Indian Constitution as a guiding principle of state policy and action. Secularism in the positive sense is the cornerstone of an egalitarian and forward-looking society which the Constitution endeavours to establish. It is the only possible basis of a uniform and durable national identity in a multi-religious and socially disintegrated society. It is a fruitful means for conflict resolution and harmonious and peaceful living. It provides a sense of security to the followers of all religions and ensures full civil liberties, constitutional rights and equal opportunities. However, this does not mean that Indian state is irreligious. Indian Constitution does not raise a wall between the state and religion. It allows state equidistance from each of them. State is to treat all religions equally. All these constitutional narratives provide a normative base for the protection and promotion of the rights of the minorities in India.[12]

Status of the International Treaties

In India treaties are not self-executing. Unless the Parliament passes a law concerning treaties, these will not become part of the corpus of national law. No matter according to the provisions of Art. 53 of the Indian Constitution in certain cases treaty may be executed by the exercise of the executive power of the state. In certain cases implementation of a treaty may require a constitutional amendment.

Under Art. 51(c) the Constitution provides that the state shall "foster respect for International law and treaty obligations in dealings of organised people with one another." This provision is however, only a Directive Principle of State Policy and hence cannot be enforced in the court of law.

Institutional Support to Minority Rights

Rights of the minorities, whether individual or group, are fundamental rights and enforcement of fundamental rights is itself a fundamental right. Art. 32(1) of the Constitution lays down that the right to move the Supreme Court by appropriate proceedings for the enforcement of fundamental rights is guaranteed. For this purpose the Court has been given Constitutional power to issue directions or orders or writs for the enforcement of fundamental rights. The right guaranteed by Art. 32 shall not be suspended except according to the provision of the Constitution relating to the declaration of emergency (Art. 359).

Art. 13 of the Constitution further provides that law inconsistent with or in derogation of the fundamental right shall be void. This Article assigns the role to the Apex Court of a sentinel on the 'qui vive', therefore, the court has not only the power but a duty also to declare a law in contravention of the fundamental rights as unconstitutional. In *Golak Nath vs. State Punjab* (1967),[13] the Court held that even a Constitutional amendment is law within the meaning of Art. 13 and would be void if it contravenes a fundamental right.

The powers given to the Supreme Court under Art. 32 for the enforcement of fundamental rights, are not confined to issuing prerogative writs only the Article is wide enough to consider even the claims of compensation arising from violations of fundamental rights.[14] Speaking generally the Court has an extra ordinary power to prevent any violation of the fundamental rights of the people including minorities. Over the years the court has developed new strategies and forged new tools to protect and develop the fundamental rights of the people in a unique manner in which no other institution has ever done. Lowering the threshold level of the traditional rule of locus standi the Court has allowed standing to any pro bono publico who acts in a bonafide manner to vindicate cause of justice in cases of violations of fundamental rights of those persons who because of socio-economic handicap cannot come before the Court and where the right violated is a diffused right.[15] Through this strategy of Public Interest Litigation or Social Action Litigation, as Professor Upendra Baxi would like to call it, the court has extended its jurisdictional to reach justice to the darkest and remotest corners of India to protect the fundamental rights of the people, especially the deprived and disadvantaged sections of the society whose rights suffer from atrophy and waste.

Furthermore, the Constitution empowers the High Courts in each state through Article 226 to issue writs, directions or orders for the enforcement of fundamental rights and for any other purpose. The power conferred on the High Courts by this Article is not in derogation to the power conferred on the Supreme Court under Article 32 of the Constitution. The duty of High Courts for providing protection to the fundamental rights of the people is in no way less than that of the Supreme Court. High Court cannot decline jurisdiction simply because it is the duty of the Supreme Court to enforce fundamental rights.[16]

The power of the High Courts and the Supreme Courts to enforce fundamental rights of the people has been further fortified by the decision of the Apex Court holding that the power of judicial review is a basic feature of the Indian Constitution which cannot be diluted or taken away even by any Constitutional amendment. Thus the Constitutional Courts provide the fundamental institutional support for the enforcement of fundamental rights of the people including minorities.

With a view to ensuring effective enforcement of the implementation of the various Constitutional provisions relating to minorities, a Minority Commission was created in 1978 which has now been given a statutory status in 1992. Commission addresses to the various problems faced by the minority communities and tries to seek redressal of their grievances.

In 1993 government passed Human Rights Protection Act under which there is a provision for the establishment of a National Human Rights Commission which was established on September 28, 1993. There is also a provision under the Act for the creation of State Human Rights Commission. Till date twelve states, i.e. Himachal Pradesh, Assam, West Bengal, Madhya Pradesh, Punjab, Tamil Nadu and Jammu and Kashmir, Kerala, Chattisgarh, Rajasthan and Maharashtra have established Human Rights Commissions. It is an ombudsman institution which oversees the protection and promotion of human rights of the people including minorities. It tries to reach justice to the people in an informal manner in case of human rights violations. Minorities like any other citizen of India can vindicate the violations of their rights.

No matter national normative of minority rights are laudable yet the national record of the protection and promotion of minority rights continues to the dismal even after fifty years of India's independence. Lack of socio-economic empowerment and absence of political will make the situation grim. Unless the executive which is what government and even state in most countries means is not consciously attuned to respecting minority right the work of other institutional mechanism shall not succeed. In most of the developing countries the concept that the executive has a duty to test its actions by the touchstone of minority rights is unknown. We may have still miles to go but the satisfaction is that we are going in the right direction.

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CHAPTER 7

Minority Cultural and Educational Rights: A Constitutional Conspectus- II

Protection of the right of Cultural Minorities

Art. 29 provides for the protection of the right of cultural minorities. Art. 29 of the Indian Constitution lays down:

(1) Any section of citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

(2) No citizen shall be denied admission into any educational institution maintained by state or receiving aid out of state fund on grounds only of religion, race, caste, language or any of them.

This right is conferred on certain sections of society which constitute minority communities.[1] This implies that if there is any cultural minority which wants to preserve its language, script and culture, the state shall not impose upon it any other culture, which may be local or otherwise. The term "culture" no matter defies exact definition but it can be described as complex patterns of social relationships, material objects, spiritual values that give meaning and identity to community life and are a source of solving problems of everyday life.

Though the marginal note of the Article 29 mentions "minority" rights yet it extends to "any section of citizens" provided such section has a distinct language, script or culture of its own.[2] It need not constitute a religious or linguistic minority as required under Art. 30(1) of the constitution.[3]

The right to conserve language, script or culture includes the right to agitate for the protection of that right. Hence any political agitation for this purpose cannot be made a 'corrupt practice' within the meaning of section 123(3) of the Representation of the People Act and it will not disqualify a person from contesting any political election.[4]

Art.29(2), which is counterpart of the equality clauses of Art.15 of the Constitution, prohibits discrimination against any citizen on grounds only of religion, race, caste, language or any of them in matters of admission into any educational institution maintained or aided by the state. The right conferred by Cl.2 is an individual right given to the citizen as such and not as a member of any community. Under Art. 29(2) discrimination based solely on the ground of citizen's religion, race, caste or language is absolutely prohibited. It applies to minorities and non-minorities equally. The words "any of them" as used in Art. 29(2) are intended to give further emphasis that none of the grounds mentioned therein can be the sole basis of discrimination.[5] However, the Supreme Court has ruled that minority institutions can give preference to candidates belonging to their own community to the extent of 50 per cent of their total intake.[6]

Protection of the Educational Rights of the Minorities

Art. 30(1) lays down: "All minorities whether based on religion or language, shall have the right to establish and administer educational institutions of their choice". The constitution declares it to be the fundamental right of minorities based on religion or language. In the proposed constitutional process this right had not been given the status of a fundamental right. After imposing a duty on the state the provision had only prescribed a limitation prohibiting state from passing any law which could be called as oppressive. The reason for giving the fundamental right status to the educational right of the minorities was to make it immune from the ordinary legislative interference. However, state in exercise of its legislative or executive power can impose reasonable restrictions on the exercise of this right.

Can this fundamental right of the minorities be abrogated by amending the constitution itself is a debateable question. If rights of the minorities are considered as an essential feature of the Constitution then Supreme Court has held that essential features of the Constitution cannot be abrogated.[7]

Ambit of Constitutional Protection

Art. 30, which guarantees educational right of the minorities, lays down:

(1) All minorities whether based on religion or language shall have the right to establish and administer educational institutions of their choice.

(2) The state shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of minority, whether based on religion or language.

(3) In 1978 Constitution (44th Amendment) added Clause (IA) to this article which authorised the state to acquire the property of any educational institution run by the minorities but with a caution that the compensation fixed or determined must be such as would not restrict or abrogate the right itself.

Added clause IA provides: "In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the state shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under the clause".

From the analysis of Art. 30 following few points that emerge may be noted.

1. Art. 30(1) is in absolute terms. Unlike other fundamental rights, it is not subject to even reasonable restrictions by the state. However, this does not mean that this right is not subject to the inherent regulatory power of the state. State may exercise regulatory powers provided (i) it is not annihilative of the right itself; and (ii) it is in the interest of the institution itself and also in the public interest. It is, therefore, conceded that the state may prescribe the standard of teaching and scholastic efficiency

expected from an educational institution and may also provide for the condition of service of teachers, hygiene, and other physical facilities for the students. But this regulatory power cannot be exercised as to invade the fundamental of the right itself.

2. The protection of Art. 30 is not limited only to educational institutions established after the commencement of the Constitution. It protects both pre-constitution and post-constitution educational institutions.[8]

3. No matter Art. 30 is a necessary concomitant to the 'right to conserve' guaranteed under Art. 29 yet the right in Art. 30 is not necessarily limited to the establishment of educational institutions for the purpose of conserving language, script or culture. Therefore, the protection of Art. 30 is also available to minority educational institutions which provide general education.[9]

4. The protection of Art. 30 cannot be denied to a minority educational institution simply on the ground that its facilities are open to the members of other communities. There is no limitation in Art. 30(1) to suggest that minorities cannot open their educational facilities to members of other communities and to accept such a limitation would mean reading some extra words in Art. 30 i.e. "for their own community" which is against all accepted norms of interpretation.[10]

5. The protection of Art. 30 also applies to educational institutions administered by the minorities despite the fact that the funds were received from foreign countries for setting up or development of the institution or that some persons are associated with the management who are not citizens of India.[11] However, it does not mean that Art. 30 confers a right on foreigners to set up educational institutions of their choice.

6. The protection under Art. 30 is necessarily not limited to those minority institutions which do not seek state aid and recognition, but extends to those institutions also which seek state aid and recognition. Minorities institutions, for this purpose, may be classified into three categories:

1. those which do not seek state aid and a recognition;
2. those which seek state aid and recognition both, and
3. those which seek recognition but not aid.

The protection of Art. 30 applies equally to all the three categories of educational institutions.[12]

Minority can claim recognition from the state for its institution as a matter of right because unless the institution is recognised it would have very little utility for the members of the community. However, there is no fundamental right to recognition. But to deny recognition except upon term which tantamount to the surrender of the educational right to administer an educational institution will be violative of Art. 30(1) of the Constitution.

Minority institutions which fall in the first category are free to administer their institutions in the manner they like and the state has no power under the constitution to place any restriction on their right of administration. However, such institutions are not immune from operation of general law of the land such as contract law, tax law, economic measures, social welfare legislations, labour and industrial law and similar other measures which are intended to meet the needs of society.[13]

7. Minority right to establish and administer educational institution of their choice consists of three main rights:

a) The right to establish educational institution.
b) The right to administer educational institution.
c) The right to determine the nature of educational institution at their choice.

The Right to Establish

This expressions "right to establish" has to be interpreted in harmony with the right conferred under Art. 29(1). While Art. 29(1) gives a cultural or linguistic minority a right to conserve its language or culture, Art. 30(1) confers right on religious or linguistic minorities to establish educational institutions of their own choice, for it is through the education of their children that the group culture and language can be maintained. However, the scope of the Art. 30(1) is wider than mere conservation of culture, etc. which is indicated by the word "choice" and includes right to establish institutions to prepare their children for higher education and for other useful careers in life.

The right to "establish" means the right to bring into existence an educational institution by a minority community. It does not matter whether a single individual or a group or the whole community brings it into existence. It is also not relevant whether other communities also take advantage of the institution. The right to "establish" also implies the right to "establish a real institution" which means an institution recognised by the government.

However, this does not give right to a minority to establish any "fake" institution. It must be a genuine educational institution. In order to decide whether the institution is genuine or not assertion of the minority is not final. Government, university and the court can go behind the claim of the minority to find out whether the claim is a mere clock or pretention and the real motive is business venture. Thus, Supreme Court held that the refusal of the state government to accord permission to the A.P.Christian Medical Educational Society to establish medical college which had been established merely a business venture does not violate the right of minority under Art. 30(1).[14]

The Right to Administer

The right to "administer" an educational institution means the right to "manage" the institution which implies the right to "sufficient freedom" to the management to manage and administer the institution in accordance with their vision and purpose. Therefore, right to "establish" and "administer" are complimentary to each other. If an institution was not established by a minority it will not have a right to administer it. It is on this logic, the Supreme Court held, that Muslims have no right to administer Aligarh Muslim University because they have not established it. The University had been established by an Act of Central legislature of 1920.[15]

Of Their Own Choice

The right to administer an educational institution may include the right to choose its managing or governing body, to choose its teachers, to use its properties for the benefit of the institution and the right to select its own medium of instruction.

Though unlike other fundamental rights given in Art. 19, Art. 30 does not lay down any limitation upon the rights of a minority to administer its educational institutions yet the right is not absolute and is subject to reasonable regulations for the benefit of the institution and consistent with the national interest. Such regulation can be made either by a legislation or by an executive order. The right to administer does not mean that a minority educational institution be allowed to fall below the educational or physical standards of excellence expected of educational institutions, hence, minority right does not include the right to maladministration.[16]

However, any state regulation shall be valid only where it is "reasonable" and facilitates a better exercise of that right so that the minority institution can be made a good vehicle of education for the minority community.[17] But in the process no state regulation can be allowed to rob the educational institution of its character. It follows that no such regulation shall be valid if it has the effect of displacing the minority administration or completely takes away its autonomy, or to have the effect of depriving the minority of its right to educate its children in its own institution.[18] Thus there is no violation of the minority right under Art. 30(1) if general legislation relating to taxation, labour legislation and other social welfare legislation are applied to minority educational institutions.[19]

The words 'of their choice' imply that the nature and purpose of the institution is entirely left to the discretion of the community. Upholding this view in *State of Bombay* v. *Bombay Education Society*,[20] C.J. Dass observed:

> There is no limitation on the subjects to be taught in such educational institutions. As such minorities will ordinarily desire that their children should be brought up properly and efficiently and be eligible for higher University education and go out in the world fully equipped with such intellectual attainments as to make them fit for entering public services. Educational institutions of their choice will necessarily include institutions, imparting general secular education also. In other

words, the article leaves it to their choice to establish such educational institutions as will serve both purposes, namely, the purpose of conserving their religion, language script or culture, and also the purpose of giving a thorough good general education to their children.

However, the words 'own choice' do not mean that right is unlimited. Minority cannot ask for recognition and aid for an institution which is mismanaged in the sense that it is being run in unhealthy surroundings without proper infrastructure, without competent and qualified teachers and does not maintain a fair standard of teaching and is subversive of the interest of the students and society.

Art. 28(3) of the Constitution prohibits compulsory, religious instructions or worship in any educational institution recognised and/or aided by the state. This prohibition equally applies to minority institutions also, which seek recognition and/or aid from the state and no student can be compelled to attend such religious exercises without his consent or if he is minor, consent of his guardian.[21] However, what is prohibited is religious and not moral educations which is not associated with any religion.[22]

Declaration of Minority Character of an Educational Institution by the Government

Some states, by law, have the power to declare minority character of an educational institution by a notification. From this the question that arises is that if the government has not notified a minority educational institution as such will such institution still be entitled to its rights under Art. 30 of the Constitution? Answering this question in the affirmative the Supreme Court in *N.Ammad v. Manager, Emjay High School*[23] clearly held that a school/college which is otherwise a minority institution would continue to be so whether the government declared it as such or not. The court explained that when the government declared an institution as a minority institution it has recognised a factual position that the school was established and is being administered by a minority community. Such a declaration is only an open acceptance of a legal character which should necessrily have existed antecedent to such declaration.

Regulatory Power of the state and the Minority Educational Institutions

The right of the minorities under Art. 30(1) per se does not admit any limitation or exception. But it is wrong to conclude that this right is absolute. It is certainly subject to the regulatory power of the state which is an inherent attribute of sovereignty of a state. However, the right of the state to regulate minority educational institutions must conform to following tests:

1. Regulation must be reasonable and must not be discriminatory.
2. Regulation must relate to the educational character of the institution.
3. Regulation must be condusive to making the institution an effective vehicle of education for minority community or other persons who resort to it.

In *Sidhrajbhai* v. *State of Gujarat*[24] court observed:

> The right (under Art. 30(1) is intended to be effective and is not to be withheld down by so-called regulative measures conceived in the interest not of the minority educational institutions, but of the public or nation as a whole. If every order which while maintaining the formal character of the minority institution destroys the power of administration is held justifiable because it is in the public or national interest, though not in the interest as an educational institution, the right guaranteed by Art. 30(1) will be but a teasing illusion, a promise of unreality. Such regulations must satisfy a dual test, the test of reasonableness and the test that it is regulation of the educational character of the institution and is condusive to making the institution an effective vehicle of education for the minority. Applying this test court struck down a regulation which required 8 per cent reservation of seats in a training

college maintained by a minority community for government nominees at the pain of loosing grant-in-aid.[25]

Same point was further elaborated by the Supreme Court in *All Saints High School v. Government of A.P.*[26] when it held that a regulatory measure of the state in order to be valid must satisfy:

1. that the institution is free from outside control and the founders must be free to mould the institution as they think fit;
2. that no part of the management could be taken away by the government;
3. that the regulatory measure aims at improving the educational standards which concern the body politic, so that the minority institution under the guise of autonomy may not fall below the standard of excellence.

Thus from the above discussion it may be concluded that the regulated liberty which neither abridges nor exaggerates autonomy but promotes better performance is the true test to determine the validity or invalidity of a governmental regulatory measure for a minority institution.

However, minority right to administer an educational institution does not carry with it a right to maladministration. Thus upholding the validity of statute 14 of the Agra University which required inclusion of principal and senior teacher on the governing body of the institution including minority institution, court held with a majority of two to one that this measure does not curtail autonomy of management of a minority institution but simply tries to obviate maladministration.[27] Justice Mathew pointed out that the regulation to prevent maladministration must relate to the manner of administration and not the manner of the Constitution of administrative body. This seems to be the right approach.

To what extent the regulatory power of the state can go in respect of minority educational institutions is a complex question and has been a subject of vehement controversy in and outside the court. Every case of regulation has to be decided on its own merit by applying the general tests laid down above. However, within a particular area of state regulation some generalizations may be drawn by reviewing the case law. Nevertheless such a generalization can only be illustrative and not exhaustive.

1. Constitution of the Governing Body and selection of Head of the Institution

J. Mathew in his dissenting opinion in *Gandhi Faiz-e-Am College* v. *Agra University* rightly held a state regulation in order to be valid must relate to the manner of administration and not the constitution of the administration.

Thus, in *State of Kerala* v. *Rev. Mother Provincial*[28] Supreme Court struck down the provisions of the Kerala University Act, 1969, as applied to minority institutions, which attempted to recognise the constitution of governing bodies by adding thereto members nominated by the government and the state and making these governing bodies responsible to the University and not to the organization responsible for setting up the institution on the ground that it interfered with the right of the minority to administer their educational institutions as given in Art. 30(1).

Similarly, in *D.A.V. College, Jullundur* v. *State of Punjab*[29] court struck down clause 2(1)(a) of the statutes of the Guru Nanak Dev University which required for a college seeking affiliation, including a minority college, to have a regularly constituted governing body consisting of not more than 21 persons including two representatives of the University and the principal of the college as ex-officio members and approved by the senate of the University. Court held that University cannot appoint its own nominees to the governing body of a minority college since it would constitute a direct interference with the minority's right of management. The same view was taken by the court in *Ahmedabad St. Xavier's College Society* v. *State of Gujarat*[30] when it held section 33-A of the Gujarat University (Amendment) Act, 1972 dealing with the constitution of governing body of the college cannot be applied to a minority institution.

However, the same court in *Gandhi Faiz-e-Am-College* v. *Agra University*[31] upheld the constitutionality of statute 14 of the Agra University which provided that the governing body of the college, including a minority college, must have principal and a teacher of the college on it. This case may be considered as an exception and not a general rule because, as the facts alleged, the college was being mismanaged. Therefore, fact remains that the state cannot interfere in the constitution of governing body of a minority institution except marginally without violating Art. 30(1).

In the same manner the right to select a head of minority institution is a matter that falls within the ambit of "administration". Hence any restriction, apart from the qualific-ations, would violate the right under Art. 30(1).[32] Therefore, court struck down a provision in the Kerala University Act which had provided a veto in the hands of the University in matters of selection of the principal of a minority institution.[33]

The Apex Court further developed the same argument in *Board of Secondary Education and Teacher's Training* v. *Joint Director of Public Instructions, Sagar and Others.*[34] In this case Madhya Pradesh Government by rules prescribed amongst others, that appointment for the post of a principal should be by promotion. Management of a minority institution wanted to appoint certain teacher as principal who according to them was senior to the respondent. The educational authorities of the state refused to approve the appointment. The Supreme Court while deciding the matter in Special Leave Petition upheld the right of choice of the management in the appointment of a principal of the minority educational institution. The Court opined that one of the incidents of the right to administer a minority educational institution is the selection of a principal. Any rule which takes away this right violates the provisions of Art. 30 of the Constitution and hence cannot be taken away by any rule or regulation. It was emphasised that no doubt state has power to regulate the affairs of minority educational institutions in the interest of discipline and excellence but in that process, the right of the management to appoint a principal of its choice cannot be taken away, even if the government is giving hundred per cent grant to the institution.

Once again the Court reiterated its earlier stand in *N.Ammad v. Manager, Emjay High School and Others.*[35] Here the management of a minority institution in Kerala state had appointed a person, who though fulfilled the prescribed qualification but was not the seniormost teacher, as headmaster of the school which was challenged by the seniormost teacher of the school. The Supreme Court upholding the appointment in appeal emphasised that the right guaranteed under Art. 30(1) of the Constitution is a right that is absolute and any law or executive direction which infringes the substance of that right is void to the extent of infringement. But the absolute character of the right will not preclude making of regulations by the state in the true interest of efficiency or instruction, discipline, health, sanitation, morality, public order and the like. As such regulations cannot be said restrictions on the substance of the right guaranteed by the constitution.

The Apex Court further amplified that selection and appointment of headmaster in a school (or principal in a college) is of prime importance in the administration of that educational institution. The headmaster is the key post in the running of the school. He is the hub on which all the spokes of the school are set around whom they rotate to generate result. The school is personified through its headmaster and he is the focal point on which outsiders look at the school. A bad headmaster can spoil the entire institution, an efficient and honest headmaster can improve it by leaps and bounds. Functional efficiency of a school very much depends upon the efficiency and dedication of its headmaster. This pristine precept remains unchanged despite many changes taking place in the structural patterns of education over the years.

The Court thus concluded that the management's right to choose a qualified person as the headmaster of the school (or principal of a college) is well insulated by the protective cover of Art. 30(1) of the Constitution and it cannot be chiselled out through any legislative act or executive rule except for fixing up the qualifications and conditions of service for the post. Any such statutory or executive fiat would be violative of the fundamental right enshrined in Art. 30 of the Constitution and would hence be void. Therefore, the management of a minority educational institution is free to find out a qualified person either from the staff of the same school or from outside to fill up the vacancy of a headmaster or a principal. If the management of the institution is not given very wide freedom to choose for holding such a key post, subject of course to the restrictions regarding qualifications to be prescribed by the state, the right to administer the institution would get much diminished. Hence it is for the management of the minority educational institutions to choose the modality for selecting the qualified persons for appointment as headmaster or the principal as the case may be.

Therefore, no state regulation will be valid if it has the effect of destroying or adversely affecting the minority right to govern and administer its educational institutions. In the following cases the judiciary has held the state regulation invalid on the ground that it takes away the core of the right given to minorities under Art. 30(1).

1. Taking over management or compelling the management to surrender the right of administration.[36]
2. Providing that the appointments, disciplinary actions etc. by the governing body would be subject to absolute veto of the state or the University.[37]
3. Empowering state to constitute managing committee or governing body according to its order or to interfere with the minority's choice of a governing body by including persons other than the members of that community. But it would not be unconstitutional to require that the principal and a senior teacher be taken into the governing body.[38]
4. Enabling state to place the management of the institution in a body corporate which is not responsible to the founders of the institution.[39]
5. Compelling the institution to refer to state or university or to arbitrator appointed by them every dispute between the management and the staff.[40]
6. Empowering the government/university to dissolve or supersede the managing committee and appointing adhoc committee in its place.[41]
7. Requiring that classes be held within university area and teaching be done by University teachers only.[42]

These instances are however, not exhaustive. These are merely illustrative. In each case the court will examine whether the regulation is reasonable and in the interest of the institution. In letter and spirit Art. 30(1) only allows regulation of the manner of administration of a minority educational institution and not the administration itself.

Teaching appointments

Teachers in any educational institution constitute the backbone of the institution and determine its standards and excellence. Therefore, unless minority institutions are allowed liberty in the selection of their teachers, they cannot fulfil the purpose for which the institution is founded. Consequently any attempt by the state to substantially curtail the power to make teaching appointments would be violative of Art.30(1). However, courts held that in the interest of academic excellence, state/university may prescribe minimum educational qualifications and may also make provisions for the association of experts on the selection committee as approved by it. However, court have also held that words like "approval" does not mean prior approval. It simply means that the authority satisfies itself that the teachers appointed in any minority institutions possess requisite qualifications and are appointed according to the procedure prescribed as per the sanctioned strength.[43]

It may also provide for the approval of selected candidate. Nevertheless state/university cannot prescribe the constitution of the selection committee in a manner that may take away power of appointment from the hands of the minority institution.[44] All regulatory measures of the selection process must be reasonable and in the interest of the institution itself in order to be constitutionally valid.

Condition of Service

Courts are unanimous on the point that in case of a minority institution receiving aid/recognition from government, state can regulate the service conditions of employees. Among others, state can provide for minimum qualifications, promotions, salaries, workload, retirement age and benefits and disciplinary matters. Such regulatory measures are permitted for ensuring orderly, efficient and sound manner of administration. However, it cannot be denied that regulating the conditions of service of employees is an essential part of the administration which is protected by Art.30(1). Therefore, any regulation in this area in order to be valid must not only be reasonable but must also not negate the substance of the right of administration itself.

Government provides for the service condition of teachers as a social security measure, so that the teachers may not be victimized and exploited by the management or put constantly in a state of mental tension. It is not denying the fact that maintenance of educational standard and excellence of the educational institutions would directly depend on the excellence of the teaching staff, and in turn that would depend on the quality and contentment of teachers. Proper conditions of service which ensure security, contentment and a decent living standard to teachers certainly encourage teachers to render better service to the institution, therefore, such measures cannot be said to be violative of Art.30(1) because such measures, in the ultimate analysis, are in the interest of the institution itself. In the absence of service conditions laid down by the state the oppression and exploitation that would follow will certainly lead to discontent and deterioration of the teaching standards adversely affecting the object of Art.30(1) of making a minority institution an effective vehicle of education for the minority community and other persons who resort to it. It was against this logic that the Supreme Court held Section 9(1) of Delhi School Education Act which empowered Administrator to make rules for minimum qualifications for recruitment and the conditions of service relating to the recognised private schools as valid and not violative of Art.30(1).[45]

Court further held that section 10 of the Delhi Education Act which required that the scale of pay and allowances, medical facilities, pension, gratuity, provident fund and other prescribed benefits of the employees of a recognised private institution shall not be less than those of the employees of the corresponding status in schools run by appropriate authority and also prescribed a procedure for the enforcement of the requirement is a permissible regulation aimed at attracting competent staff on which excellence of the institution is based and hence, constitutional when applied to a minority institution and does not violate Art.30(1). Court further observed that if section 10 is not applied to a minority institution it would be a violation of Art.14 (Equality Clause) also because discrimination in pay and other conditions of service of school teachers on the basis of aided and unaided schools run by the minority will not be rational. Court also clarified that where employer is legally bound to provide higher pay and better conditions of service to its employees, financial incapacity of the employer is not a relevant consideration. Ratio of Frank Anthony case, therefore, is that even an unaided minority institution cannot refuse prescribed scale of pay and other benefits to its employees because excellence and efficiency of an institution, to a great extent, depends on better pay and better service conditions of its employees.

In the same manner, Supreme Court held that when state pays for the salaries it can also prescribe the age of superannuation. Court observed that such a provision would not in any way interfere with the minorities right of administration because the administration is still free to employ teachers beyond the age of 58 years fixed by the state but state shall not be responsible for payment grants towards the salaries of such teachers.[46]

Therefore, it can be safely concluded that statutory measures regulating the conditions of service of employees of minority institutions do not offend Art.30(1) provided these are designed to make minority institutions an effective vehicle of education.

Medium of Instruction

Articles 29(1) and 30(1) when read together fortify the inevitable conclusion that minorities have a constitutional right to determine the medium of instruction for their educational institutions. Art.29(1) allows minorities to conserve their language and script and Art.30(1) empowers them to establish educational institutions for this purpose. The use of the words "of their own choice" in Art.30(1) necessarily include a choice to determine the language of instruction.

Institutions established by the minorities for their children cannot be compelled to open Hindi or other language classes. Thus in *State of Bombay v. Bombay Education Society*[47] the court held that the Bombay government circular directing Anglo-Indian schools to open progressively classes using Hindi or an Indian language is violative of the minority rights under Art.30(1) and also Art.29(1). Court observed that Anglo-Indian community, which is based on religion and language, has right under Art.29(1) to conserve its language and under Art.30(1) to establish and administer educational institutions of its choice.

Similary in *D.A.V. College, Bhatinda v. State of Punjab*,[48] Supreme Court struck down a circular of the Punjabi University prescribing Punjabi in Gurumukhi script as the sole medium of instruction and examination. Court held that it violated the rights of minority with Hindi as its medium and Devnagari as its script which is guaranteed to it under Art.29(1) and 30(1) of the Constitution.

However, in D.A.V.College v. *State of Punjab*,[49] court upheld the constitutionality of clauses 3 and 4 of section 4 of the Guru Nanak Dev University Act, 1969 which had made it compulsory for the affiliated colleges, including minority institutions, to open centres of research on the teachings of Guru Nanak Dev on the ground that it is merely a provision, academic in nature, and does not amount thrusting a study in a particular religion on the minority community institutions.

Once again the whole question of the state language policy in retation of minority educational institution came under the scrutiny of the Apex Court in *English Medium Students Parents Association* v. *State of Karnataka*,[50] the State of Karnataka, wedded to the cause of promotion of Kannada issued a notification making Kannada a compulsory sole first language from the first standard and at secondary school even for the schools run by the linguistic minority. The validity of this order was questioned on the ground that it violates Art.29 and 30 of the Constitution.

In support of the grounds of the writ it was contended that Articles 29 and 30 must be read along with Article 39(f) of the Constitution which provides that childhood and youth are protected against exploitation and against moral and material abandonment. Therefore, if children are to be given proper opportunities in relation to education no language should be imposed. It is the choice of the parents to select the language for the child. Under the impugned order from Vth standard onwards Kannada has been made compulsory, that cannot be done vis-a-vis linguistic minorities. In support of this argument reliance is placed on *D.A.V. College* v. *State of Punjab.*[51] Again when Punjabi was made the sole medium of instruction, the Supreme Court struck down such a provision in *D.A.V.College, Bhatinda v. State of Punjab.*[52] It was further laid down in *Ahmedabad St.Xavier's College Society* v. *State of Gujarat*[53] that the linguistic minorities have a fundamental right to conserve their language or culture. That cannot be interfered with and there cannot be an element of force obliging the student to study another language. It was also argued that by forcing students of minority institutions to study Kannada there is a violation of Article 14 also in so far as there is no equal opportunity for non-Kannada speaking students which is arbitrary and liable to be struck down as held in *Maneka Gandhi v. Union of India.*[54] The Apex Court after going through the merits of the case came to the conclusion that the sting of the government order and notifications was the element of compulsion especially on the children belonging to linguistic minorities from the first year of the primary school making Kannada as the sole first language in the secondary schools are violative of the provisions of the Articles 29 and 30 of the Constitution.

Thus it may concluded that Art.30(1) implies the right of a minority community to impart instructions to the children of its own community in its educational institutions in its own language. The power of the state to determine the medium of instruction must yield to the fundamental right of the minority community to impart instructions in their own language. Even though Hindi is a national language and Art.351 of the Constitution provides a special directive to the state to promote the spread of Hindi, nevertheless, this object cannot be achieved by any means which contravenes the rights of the minorities guaranteed by Arts.29 and 30 of the Constitution.

Fee Pattern

The question, whether in exercise of its regulatory power, the state can prohibit charging fee in primary and secondary schools run by the minorities on the ground that Art. 45 of the Constitution casts a duty upon the state to provide for free and compulsory education upto the age of 14 was considered by the Supreme Court *In re Kerala Education Bill case.*[55] Court held that the duty cast upon the state to provide free education to children cannot be so discharged as to prohibit minority schools from charging fee and thus paving the way for their closure.

Consistent with the general policy state may require minority institutions to charge only the prescribed fee and if the management decides to charge higher fee it may seek the approval of the state. Such provisions, even as a condition for recognition, have been held to be regulatory in nature and hence valid.[56]

Today the fee structure of the private educational institutions including minority institutions has come in high social visibility area and has generated intensive public debate. Escalation of fee structure and donations of various forms is being seen as an exploitation by the private schools and minority educational institutions are no exception. In many situations state had to intervene.

This problem was very glaring in case of professional colleges like medical and engineering. Problem of capitation fee charged by these colleges assumed a form of a national crisis in which judiciary had to intervene. The Supreme Court had to frame the scheme regarding admission and fee to be charged by private professional colleges including minority College. In *Sahal H.Musaliar* v. *State of Kerala,*[55] the Court held that it is for the government to decide the minority status of any minority professional college and after it is decided 50 per cent of the total seats in an institution be filled up by the management on the basis of competitive examination/test and the selected candidates will pay fees as determined by the government. Remaining 5 per cent seats can be filled up by the College from amongst the candidates belonging to the particular religious or linguistic minority on the basis of inter se merit and shall pay fee as determined by the government. Out of the respective quota of seats half to be "payment seats" and half "free seats". Out of the "payment seats" to be filled by the management 15 per cent seats can be filled by non-resident students. Catholic Bishops Conference of India Society for Medical Education, Bangalore and Christian Medical Association, Vellore were permitted by the Court to admit students on the basis of admission test conducted by them because of their distinct position. Thus the scheme of fee prepared by the Court/government shall be applicable to minority institutions also which seek permission to establish and/or recognition and/or affiliation from the appropriate authority.[58]

Like any other educational institution, excepting those which do not charge any fee, minority institutions also can be subjected to the jurisdiction of the consumer courts established under the Consumer Protection Act, 1986. If the fee structure of the institution is arbitrary and unjust, consumer courts may grant relief.

Recognition and Aid

"Recognition and Aid" are two very powerful instruments in the hands of the state to exercise control over minority educational institutions. It may be mentioned that there is no fundamental right of a minority institution to get recognition and aid.[59] It may be said that the right to aid and recognition can be derived from the Act itself. Right to aid and recognition is included in Art.30(1) itself because the right to establish and administer an educational institution must be real which will be rendered illusory if minority institution remain unrecognized and unaided. Furthermore, Clause (2) of Art.30 provides, though in negative terms, that state shall not discriminate in granting aid to educational institutions on the ground that it is a minority institution.

While allowing recognition and aid, state may lay down certain pre-conditions. But it does not mean that state can lay down any condition as it pleases. A pre-condition, in order to be valid, must be reasonable, non-discriminatory and must not destroy the right of establishment and administration of the institution.

In order to decide whether a pre-condition destroys the right under Art.30(1) regards must be had to the substance and not to the form of the condition.

No matter though state power to make law on any aspect of education is plenary yet Art.30(1) constitutes a limitation on the legislative power of the state. One of the fundamental principles of law is that what one cannot do directly will not be allowed to do it indirectly. Thus, if the state cannot take away the right of minorities to establish and administer their educational institutions it cannot do it indirectly by prescribing such conditions for recognition and aid that negate the exercise of this right.

Therefore, it may be concluded that only such pre-conditions may be validly imposed, either by legislative or executive action of the state, for receiving recognition and aid, which are reasonable and directed to making the institution, while retaining its minority character, an effective educational institution. A regulation would be reasonable if it reconciles or secures a reasonable balance between the two objectives of ensuring a standard of excellence of the institution and of preserving the right of the minority to administer the institution as a minority institution.[60] Any regulation which does not cater to these objectives would be void even though it may be otherwise conducive to the interest of general public or otherwise salutary.[61] Applying this principle court held that a pre-condition of reservation of 8 per cent seats in a minority training college for granting recognition and aid violated minority right guaranteed under Art.30(1).[62]

Similarly in *D.A.V. College, Jalandhar v. State of Punjab*[63] court struck down clause 2(1)(a) and 17 of the Guru Nanak Dev University statutes which laid down conditions for affiliation as violative of Art.30(1). Clause (1)(a) had provided that governing body of the college should include two representatives of the university and clause 17 had provided for the approval of Vice-Chancellor for the existing and subsequent faculty members. Supreme Court held that these pre-conditions for affiliation interfered with the minority right to administer their educational institutions.

In the same manner where state regulations debar students of unrecognised educational institutions from receiving higher education or for entering into public services, the court held that the right of the minority to establish an institution under Arts.30(1) cannot be effectively exercised without obtaining state recognition. Thus state cannot impose it as a condition precedent to recognition that the institution must not receive any tuition fee in primary classes unless state also lays down a mechanism for recouping the school's financial loss because without such a recupation institution cannot survive. Such a condition would thus be void for contravention of Art.30(1) of the Constitution. It follows from this that state may impose reasonable regulation for the purpose of ensuring sanitation, competence of teachers, maintenance of discipline, conditions of service providing for appeal against order of termination, infrastructural facilities and the like.

Like recognition, aid from the state outside Art.337 is also not a fundamental right. But if state gives aid it cannot impose conditions which virtually annihilate the right guaranteed to the minorities under Art.30(1). It cannot be argued that the right under Art.30(1) is available only so long as the minority community is in a position to run the institution out of its own resources and if it seeks state aid it must submit to any condition imposed by the state. Surrender of fundamental right of minorities under Art.30(1) cannot be exacted as a price for state aid. Thus condition precedents for state aid must be reasonable and in the interest of the institution. However, state may lay down a condition to ensure that the aid is properly utilized for the purpose it is given. But it cannot lay down a condition that the state may take over management of the institution or may acquire under certain contingencies, for it would be unreasonable and would completely destroy the right of the minority community to administer its institution. Art.30(2) specifically prohibits state to discriminate against any minority institution in matters of granting aid.

Admissions

No one can deny that the right to admit a student to an educational institution is implied in the right to administer the institution guaranteed by Art.30(1). The question of admission to a minority educational institutions imparting liberal education seldom poses a problem because of the available space for adjustments. However, in minority institutions of technical education this poses a very serious problem.

Earlier law on the point was laid down by the Madras High Court in *Director of School Education v. Rev.Brother G. Arogiasamy.*[64] This case was concerned with the weightage to be given to the students of Roman Catholic community in admissions. Upholding the weightage system, court observed that if it is not allowed it will violate the protections of Art. 30(1) given to the minority institutions. In this behalf references may also be made to *Sidharajbhai Sabhai v. State of Bombay*[65] in which court struck down a regulation of the state reserving 80 per cent seats in the minority training college for government nominees on the ground that it infringes the right of the minorities under Art. 30(1). Court held that any such regulation in order to be valid must be reasonable and in the interest of minority educational institution. Though Court found 80 per cent reservation as excessive but did not lay down any percentage which can be considered as reasonable.

Similarly court held that Christian community cannot be denied permission to admit girl student in a largely boys school on the ground that separate facility for girls exists in nearby school.[66] This all shows that courts interpret the word "administer" to include admissions also.

However, Allahabad High Court handed down an important decision in this behalf in *Sheetansu Srivastava* v. *Principal, Allahabad Agriculture Institute* (1989).[67] In this case question for the consideration of the court was whether the minority right to administer their educational institutions as guaranteed under Art.30(1) includes a right to reserve seats for the minority community students on the ground of religion where the institution is receiving financial aid from the State? This question arose in this case with reference to certain students who appeared in the entrance test for admission to B.Tech. and B.Sc. (Agri.) courses held by the Allahabad Agriculture Institute, a minority institution. Petitioner students were denied admission though they had secured a high percentage of marks in the competitive test, because some seats had been reserved for Church-sponsored candidates. Contention of the petitioners was that this is an unjustified discrimination violating Art.29(2) of the Constitution. Art. 29(2) provides:

> No citizen shall be denied admission into any educational institution maintained by the state or receiving aid out of state funds on the grounds only of religion, race, caste, language or any of them.

Allowing the petitions the High Court held that the right of the minorities under Art.30(1) to administer their educational institutions must be read subject to Art.29(2). Reference may be made to the decision of the Supreme Court in the writ filed by Christian Medical College, Ludhiana (1990) in which college was allowed to have its own entrance test for admission to the medical courses and decide its admission pattern. However, it may be kept in mind that Christian Medical College, though recognized by the Punjab University, is not receiving aid from the state for its education programme. Nevertheless, under similar fact situation, Bombay High Court came to a different conclusion. In *John Wilson Education Society v. Director of Education* (1991), the Division Bench of the Bombay High Court held that minority institutions can admit students of their choice including students of their own community.

From the legal point of view it can be argued that the decision of the Allahabad High Court in case cited above, restricts minorities' rights under Art.30(1). The reasons may be, firstly, that Art. 30(1) and 29 cover entirely different field, hence cannot be read together. Art.29 confers right on any sections of society while Art.30(1) is confined to minorities only. Secondly, Art.29 is concerned with language, script or culture, whereas Art.30(1) deals with minorities based on religion or language. Thirdly, Art.29 is concerned mainly with the right to conserve language, script or culture, whereas Art.30(1) deals with the right to establish and administer educational institutions of their choice. Fourthly, the purpose of Art.29 and 30 are not inter-connected. A minority under Art. 30(1) may establish an educational institution which may not have anything to do with the conservation of language, script or culture, but vice-versa is not correct. At the most one may say that if we draw two circles of the scope for Art.29 and 30, at some point they may overlap but one cannot be subordinated to the other.

However, if one reads this judgement against the backdrop of prevailing ethos of secularism of the society and the constitution one cannot disagree that any preferential treatment based solely on religion sounds invidious. Therefore, minority institutions receiving aid from public exchequer shall have to find some other criteria along with religion to admit students of their communities in preference to others. It may be noted that Art.29(2) prohibits admission discrimination on the grounds only of religion, race, case, language or any of them. Here the word "only" is important and implies that discrimination can be made if some other grounds are also combined with grounds of religion etc. Without trying to be exhaustive such other grounds may be poverty and educational or social backwardness.

The whole question of admissions in minority institutions came before the Apex Court in *St.Stephen's College* v. *Delhi University (1992)*.[68] This case also disposed of the appeal in *Sheetansu Srivastava Case*.[69]

Main questions involved in this case were:

1. Can these minority educational institutions admit Christian students by preference or against the reserved quota and, if so, will this differential treatment for the students of its own community on the basis of religion would be valid under Art.29(2) of the Constitution?
2. What would be the reasonable percentage of this reservation?
3. Can these institutions follow their own admission procedure to the exclusion of the one laid down by the state or the affiliating university?

Decision of the Court on these questions may now be noted.

1. Can minority educational institutions have their own admission procedure to the exclusion of the one laid down by the state or the affiliating university?

This was the one of the main issues involved in St.Stephen's case.

The Court held that minority educational institutions, no matter affiliated and receiving aid from the state funds, can have their own admission procedure provided it is not arbitrary or unreasonable. Court observed that in case of admission through interview not more than 15 per cent marks be allotted for the interview to avoid arbitrariness. Thus the Supreme Court accepted the procedure of oral interview as a "supplementary" and not "exclusive" test for assessing the suitability of candidates for admission. Admission procedure in order to be valid must be based both on candidate's academic record and performance at the interview. Applying this test the Court found no arbitrariness or lack of scientific basis in the admission procedure of the St.Stephen's College and the Allahabad Agricultural Institute.

Nevertheless, Justice Kasliwal gave a dissent in this case holding that the admission procedure laid down by the university is binding on all colleges, including a minority institution, because this does not in any manner adversely affect the minority character of a institution. Furthermore, he emphasized that the interview-based admission procedure is inherently weak because of the subjective element inherent in it. He went on to say that the 'breezy and shiny' type candidates get an advantage in an interview specially at the college admission level and 'rough uncut diamonds' may go unappreciated.

2. Can minority educational institutions give preference to students of their community in matters of admission?

This was the most sensitive issue that came before the Supreme Court for the first time in St.Stephen's case (1992).

St.Stephen's College gives preference to Christian students while Allahabad Agricultural Institute reserves seats for the Christian students. Therefore, the issue before the Supreme Court was whether a minority educational institution receiving aid from state fund is entitled to accord preference in favour or reserve seats for candidates belonging to its community on the basis of religion in view of the prohibition of Art.29(2) of the Constitution.

It may be made clear that if a minority institution is not receiving aid from state funds it can admit students of its own community and there cannot be any constitutional objection to it.

Art.29(2) of the Constitution provides:

> No citizen shall be denied admission into any educational institution maintained by state or receiving aid out of state funds on grounds only of religion, race, caste, language or any of them.

Thus the mendate of Art.29(2) is that there shall not be any discrimination based on religion in case of admission of students in educational institutions maintained by the state or receiving aid from state funds. The basic consideration before the court was whether this prohibition applies to the minority educational institutions also. Following its earlier stand the Court held that Art.29(2) cannot be intended to nullify the special rights guaranteed to minorities in Art.30(1) which gives them the constitutional right to establish and administer their educational institutions.

The Court further observed that the width of Art.30(1) cannot be cut down by the considerations on which Art.29(2) is based. The words "of their choice" in Art.30(1) leaves vast options to the minorities in selecting the type of educational institutions they wish to establish to conserve their distinct language, script or culture or for imparting secular education.

In order to fortify its conclusion in the case the Supreme Court further argued that Art.29(2) deals with non-discrimination but the general equality by non-discrimination cannot be the only goal of the minorities. The minority rights under the majority rule implies more than non-discrimination because the protection of interests and institutions and advancement of opportunity are also important for minorities. Hence, differential treatment that distinguishes them from the majority is a must to preserve their basic characteristics and this appears to be the main reason for incorporating Art.30(1) in the Constitution as a fundamental right of minorities.

Repelling the main argument of the respondents based on "non-discrimination based on religion" of Art. 29(2) and equality in general based on Art. 14, the Supreme Court held that in order to treat some persons equally at time, they have to be treated differently and hence, differential treatment in the admission process for Christian students in their educational institutions is within the concept of equality because Christian students for various socio-economic reasons cannot compete at par with the rest of the students. However, the Court was quick to add that laws carving out the rights of minorities in Art. 30(1) must not be arbitrary, invidious or unjustified; they must have a reasonable relation between the aim and the means employed. The individual rights will necessarily have to be balanced with the competing minority interest.

In the same manner countering the argument of "secularism" which is cornerstone of the Indian Constitution, the Supreme Court observed that minorities cannot be treated in a religious neutral way in their educational institutions. Clearly that was not the aim of Art. 30(1) as this right was incorporated to secure to the minorities a fair deal in the name of religion only. The Court further observed that the catholic approach that led to the drafting of the constitutional provisions dealing with the minority rights should be maintained and thus nothing is to be done to deprive the minorities of a sense of belonging and a feeling of security.

On the basis of these arguments the majority of the Supreme Court came to the conclusion that under Art. 30(1) minority educational institutions receiving aid from state funds are entitled to prefer their community candidates in order to maintain the minority character of the institution. However, the Court was quick to add that this differential treatment must be in conformity to the university standards and must not exceed 50 per cent of the annual intake in order to maintain a balance between Art. 29(2) and Art. 30(1) of the constitution.

It may be mentioned that the Supreme Court in different petitions allowed the Christian Medical Colleges at Ludhiana, Vellore and Banglore to continue with their own admission procedure wherein certain seats are reserved for Christian students.

In his dissenting opinion Justice Kasliwal argued that the right guaranteed to the minorities under Art. 30(1) to establish and administer their educational institutions is subject to the prohibition of Art. 29(2) and therefore, no minority institution can reserve any seat for the member of its own community on the basis of religion. He also built his arguments on the basis of secularism and equality clauses.

3. *What can be reasobale reservation by a minority educational institution for the students of its own community?*

It was held by the Court that such reservation should not exceed 50 per cent of the annual intake of the College. The Court observed that in case of a minority educational institution receiving aid from state funds the interests of minority and majority compete for recognition and therefore, in order balance these two competing claims of reservation should not exceed 50 per cent. The magic figure of 50 per cent reservation was taken from *Balaji* v. *State of Mysore*[70] where the Supreme Court held that 68 per cent reservation of the seats in Medical and Engineering Colleges was a fraud on the Constitutional power conferred on state by Art. 15(4) which empowers state to make special provision for the advancement of any socially and educationally backward classes or for the scheduled castes and scheduled tribes. Though Court did not lay down the maximum permissible limit of reservation but observed that it must be less than 50 per cent, but how much less than 50 per cent was left to be decided upon the fact situation of each case.

No state aided minority institution can refuse to admit members of backward classes or scheduled castes and tribes if state makes any special provision for them under Art. 15(4) of the Constitution.[71]

The decision of the Supreme Court in St. Stephen's case (1992) would certainly stand as a milestone in the history of minority educational institutions. It is on the basis of this binding precedent that the Lucknow Bench of the Allahabad High Court held, in a writ petition, that the Isabella Thoburn College, Lucknow, a minority women college, can admit only 50 per cent Christian students in its B.Ed. programme by following its own admission procedure. However in *T.M.A. Pai Foundation (II) v. State of Karnatka*, a Division Bench has again reopened the same issues which had been decided by the St. Stephen's case and other cases earlier decided by referring various issues concerning minority educational right to a larger Bench of the Supreme Court for reconsideration. These issues are:

1. What is the meaning and content of the expression "minorities" in Art. 30 of the Constitution?
2. What is the meaning of the expression "Minority Educational Institution" and what are the indicia to determine whether an educational institution is a Minority Educational Institution?
3. Whether the decision of the Court in St. Stephen's case is right in saying that Art. 30 clothes a Minority Educational Institution with the power to admit students by adopting its own method of selection and that the state or the affiliating university has no power to regulate admission of students to such Minority Educational Institution even while permitting the Minority Educational Institution to admit students belonging to the relevant minority to the extent of 50 per cent of its intake capacity?

What would be the response of the larger Bench of the Supreme Court on these questions vital for the existence of minority educational institutions can be a matter of speculation but one thing is certain that there exists an ample support, historical, decisional and logical, for the decision of the Court in St. Stephen's case.

Acquisition of property belonging to minority educational institutions

Right of the minorities to administer their educational institutions includes a right to property belonging to such educational institutions. If right to administer property is taken away, it will make other rights illusory. Therefore, in *St.Xavier's College case*[72] Supreme Court held that section 40 and 41 of the Gujarat University (Amendment) Act 1972 which sought to convert a minority institution into a constituent college with control over its laboratories and library facilities violated minority right under Art. 30(1).

It may be noted that fundamental right to property had now been abolished by the Constitution (Fourty fourth Amendment) Act 1978 and by the same Amendment Art. 31 relating to Compulsory acquisition of property has also been repealed. However, a new clause (IA) has been added to Art. 30 by the 44th Constitution Amendment Act, 1978 which authorizes the state to acquire any property of the minority educational institution. Nevertheless, this right of the state must give such compensation for the acquisition of property as would not restrict or abrogate the minority right to establish and administer educational institution. The effect of the condition is that the amount of compensation must be such that the financial capacity and resourcefulness of the management to establish and administer educational institution is not adversely affected.

This implies that if the state seeks to acquire the property of a minority educational institution, the law must provide for such compensation as would enable the minority community to replace the acquired institution by a new one comparable to the acquired one. Keeping in view the cost of construction the amount of compensation may be higher than the market value of the acquired property. Thus the amount of compensation fixed by law can be challenged by the minority institution on the ground that it is not adequate. This right is not available to any other individual or institution as there is no constitutional obligation to provide a certain amount as compensation. This goes to show the primacy which the constitution attaches to the group educational rights of minorities is a clear indication of its plural philosophy.

Taking over management of the Institution

Can state take over the management of a minority institution temporarily or permanently? It is a complex question for which there is no straight answer. Supreme Court has held that though the minorities have a right to establish and administer educational institutions of their choice but they have no right to maladministration.[73] Therefore, if an institution is grossly maladministered, state will be within its right to take over its management or may make such provisions as are necessary to put the institution back on rails. Logic behind such an approach is that state regulatory measures which are designed towards making the institution an effective vehicle of education for the minority community or other persons who resort to it cannot be considered to impinge upon the right guaranteed by Art. 30(1). However, this power of the state cannot be lightly exercised and has to be confined to rarest of the rare cases.

Moving in the same direction, the Supreme Court quashed S.63(1) Kerela University Act, 1969 which had provided for a temporary takeover of the management of an institution including minority institution. S.63(1) had provided:

> (1) Whenever the government are satisfied on receipt of a report from the University or upon other information that a grave situation has arisen in which the working of a private college cannot be carried on for all or any of the following reasons namely:
>
> (a) default in the payment of salary of the members of the staff of the college for a period not less than 3 months;
>
> (b) wilful closing down of the college for a period of not less than one month except in case the closure of the college during vacations.
>
> (c) persistent default or refusal to carry out all or any of the duties imposed on any of the authority of the college by this Act or ordinance or regulation or rules or bye-laws or lawful orders passed thereunder:
>
> and that in the interest of the private college, it is necessary so to do, the government may after giving governing body... a reasonable opportunity of showing cause against the proposed actions and after considering the cause, if any, shown by order appoint the University to manage the affairs of such private college temporarily for a period not exceeding two years.

Quashing the above provision as applicable to a minority institution, Supreme Court observed that though the provision is in the interest of education but it cannot rob the founders of the right which the Constitution desires should be theirs.[74]

General Administrative Control

To what extent state can exercise a general administrative control over a minority educational institution is again a complex question which does not admit a simple answer. The right guaranteed to minorities based on religion by Art.30(1) is to establish and administer educational institutions of their own choice. Main element of this right lies in the words "of their own choice". These words indicate that the extent of minority right is to be determined, not with reference to any concept of state or social necessity but with reference to the educational institutions themselves, that is, with reference to the goal of making the minority institutions "affective vehicle of education for the minority community or other persons who resort to it". Therefore, only those regulatory measures of the state would be valid which are designed towards the achievement of this goal. Consequently in each case of state regulatory measures the question would be whether the particular measure is, in the ultimate analysis, designed to achieve such goal, without nullifying any part of the right of management in substantial measure. If the answer is in affirmative then regulative measures will be valid otherwise invalid.

As an illustrative measure we may refer to the decision of the Supreme Court in *All Bihar Christian Schools Association* v. *State of Bihar.*[75] In this case Bihar Non-government Secondary Schools (taking over management and control) Act 1981 had been challenged on the ground that it violated the minority right under Art.30(1). Main attack was on section 19(3) which contained matter relating to general administration of the minority institutions.

1. Clause (a) of Section 18(3) provided that every minority school shall frame written bye-laws for the constitution of managing committee entrusting with the responsibility of administering the school. Court held this clause as valid on the ground that is in the interest of the institution itself to have a

written constitution of its managing committee so that no outsider may pose as a member of the managing committee.

2. Clause (b) of Section 18(3) provided that managing committee should make appointments with the "concurrence" of the school service board. Purpose of the provision was to ensure appointments according to prescribed qualification and strength. Court held this provision valid on the ground that this clause is merely to ensure education excellence in the minority institution.

3. Clause (c) of Section 18(3) required that the managing committee should frame rules of employment consistent with principles of natural justice and the existing law. Court found this clause also valid on the ground that this provision is directed towards avoiding uncertainly and arbitrary exercise of power in service matters.

4. Clause (d) of Section 18(3) provided that disciplinary action of the managing committee are to be approved by the school service board. Court held this provision valid on the ground that no unguided and ultimate power has been given to the authority.

5. Clause (e) of Section 19(3) which provided against the appointment of mentally and physically incapacitated persons as teachers was upheld on the ground that is in the interest of the institution itself.

6. Clause (f) of Section 18(1) which prescribed 58 years as the age of retirement was upheld on the ground that this does not curtail the right of the management of employing people beyond this age but state shall not pay for them.

7. Clause (g) of Section 18(3) consistent with the general policy of the state, made it a requirement of recognition for a minority institution that it should charge only the fee prescribed by the state. Court upheld this provision that minority institution, if they so wish, may still charge higher fee with the approval of the state government.

8. Clause (h) of Section 18(3) provided for inspection to see that funds given to the institution are properly utilized. It further provided for the inspection by health officers to ensure hygiene cleanliness of health of the students. Court held that this does not trespass upon the minority right.

9. Clause (i) of Section 18(3) laid down principles and methods relating to admission, transfer of students, discipline, punishment and maintenance of accounts. These provisions were also upheld on the ground that these are essential to maintain efficiency in the administration. However, if in exercise of these powers, state frames rules interfering with the minorities right under Art. 30(1), then such rules would be void.

10. Clause (j) of Section 18(3) empowers state to issue mandatory instructions consistent with the provisions of Art. 29 and 30 for efficient management and for improving the standard of teaching, court held this provision as valid on the ground that firstly, power to issue instructions is not unlimited and secondly, instructions are issued for the better management.

11. Clause (k) of Section 18(3) conferred right on the management to challenge any arbitrary exercise of power by an authority withdrawing recognition or withholding aid. Certainly this provision safeguards the interest of a minority institution hence valid.

12. Provisions of section 3 providing for taking over the manage-ment of the institution was upheld by the court because it applied to a minority institution only if there was an unconditional offer from the institution itself.

This case amply illustrates judicial behaviour which permits state regulation in true interest and efficiency of the institution and its discipline, health, sanitation, morality, public order and the like. Such regulations are not considered restriction on the substance of right guaranteed under Art. 30(1) as these secure the proper functioning of the institution. In *St.Xavier's College case*[76] Highest Bench ruled:

> In the field of administration it is not reasonable to claim that minority institutions will have complete autonomy. Checks on the administration may be necessary in order to ensure that the administration is efficient and sound and will serve the academic needs of the institution. The right of a minority to administer its educational institution involves, as a part of it, a correlative duty of good administration.

Now a legitimate question that one can ask is that what is the test to determine the validity or invalidity of any state measure concerning the administration of a minority institution? Answer to this question lies in the words "regulation" and "abridgement". So, long a state measure is "regulatory" and does not enter into the forbidden territory of "abridgement" it is valid otherwise not. Therefore, in every case court gives contents to the word "abridgement" in order to decide the constitutionality of any state regulatory measure under Art. 30(1).

Disciplinary powers

One important aspect of the administration is the right of the management of minority institution to exercise disciplinary power over its employees. To what extent regulatory power of the state can go in curtailing this power is a complex question. On the one hand where disciplinary powers with the management are necessary for the academic growth of the institution, on the other hand, if unchecked, disciplinary powers may be exploitative and humiliating. Therefore, court have to hold a very delicate balance. Hence, keeping in view the actualities of ground realities courts have been shifting their position. Latest law on the point has been laid by the Supreme Court in *Frank Anthony Public School Employees' Association v. Union of India.*[77] However, before discussing this case it is worthwhile to know the trend of judicial mind before this case.

In this behalf reference may be made to the case *State of Kerala v. Rev. Mother Provincial.*[78] Kerala University Act, 1969 had taken away the power of discipline from the management and conferred it upon the University by providing that no teacher shall be dismissed or reduced in rank by the governing body without the previous sanction of the Vice-Chancellor or placed under suspension for a continuous period exceeding 15 days without the previous sanction and that a teacher against whom disciplinary action is taken shall have a right to appeal to the University Syndicate and the Syndicate shall have power to order reinstatement and the governing body shall comply with the order (S.56). Before the Supreme Court it was argued by the state that the Act in fact has implemented the recommendations of

Education Commission regarding condition of service of teaching staff. However, the court held that even though these provisions are made bonafide in the interest of education but unfortunately they do affect the administration of minority institutions and the right of the founders of the institution which the Constitution desires should be theirs.

Similarly in *St.Xavier's College case*[79] Court held that section 51-A and 52-A of the Gujarat University Amendment Acts, 1972 as applied to minority institutions are void for violation of their right under Art. 30(1) of the Constitution. Clause (b) of section 51-A gave power to the Vice-Chancellor and an officer of the University authorized by him to veto the action of the managing committee in awarding punishment to a member of teaching staff. It is significant to note that the power of approval conferred on the Vice-Chancellor or his nominee was a blanket power. Act does not lay down any guidelines for the exercise of power. It is not provided that the approval is to be withheld only in case where dismissal, removal, reduction in rank or termination of service is malafide or by way of victimization or other similar causes. Court observed that conferment of such wide power for vetoing the disciplinary action makes a serious in-road on the right of the managing committee to administer an educational institution and thus is violative of Art.30(1) so far as minority educational institutions are concerned.

Section 52-A of the Act relates to the reference of disputes between management and any employee of the college connected with the conditions of service of such an employee to a Tribunal of Arbitration, consisting of one member nominated by the management, one nominated by the employees and an Umpire appointed by the Vice-Chancellor. Section 52-A is again widely worded and covers any dispute between the management and the employees, no matter, however, trivial or insignificant it may be. Thus, section 52-A has the potentialities of involving management in continuous arbitration proceedings. Furthermore, Act gives power to the Vice-Chancellor to nominate an umpire. Normally in such disputes there would hardly be any agreement between the nominee of the management and the employee. Therefore, in all intents and purposes the nominee of the Vice-Chancellor will decide the dispute. Consequently, the management would thus be hardly in a position to take any effective disciplinary action against any employee. Hence, on these two grounds, the court held that section 52-A violates Art. 30(1) as applied to minority educational institutions.

Reference may also be made to *Lilly Kurian v. Sr. Lewina*[80] wherein the Supreme Court was required to consider a more or less similar provisions as in *St.Xavier's College case.*[81] The Court held that the conferment of a right of appeal to an outside authority like the Vice-Chancellor which took away the disciplinary power of a minority educational institution was violative of Art.30(1) of the Constitution since the said power was uncanalised and unguided in the sense that undue restriction had been placed on the exercise of the power.

Same approach of the Court is visible in *Lilly Kurian v. University Appellate Authority*[82] when the Supreme Court once again reiterated that in case of dispute between management of a minority educational institution and a teacher relating to conditions of service, conferment of a right to appeal to an outside authority took away disciplinary powers of a minority educational authority, particularly because the appellate power was unlimited and undefined. In this case The Kerala University Act, 1974 had conferred wide blanket powers on the Appellate Tribunal which had not been defined including the power to interfere with the punishment imposed and order reinstatement of any dismissed teacher of a minority educational institution. The Court concluded that such unlimited powers could not be construed merely as a check on maladministration and hence, interfers with the right of a minority institution to administer its own educational institution guaranteed by Art.30(1) of the Constitution.

However, a different note was sounded by the Supreme Court in *All Saints High School, Hyderabad* v. *Government of Andhra Pradesh.*[83] In this case a provision imposing certain restrictions on the power of suspension of a teacher by a minority educational institution which were contained in Clauses (a) and (b) of sub-section (3) of Section 3 of the Andhra Pradesh Recognised Private Educational Institutions Control Act, 1975 were upheld by the Supreme Court.

Section 3(3)(a) provided that no teacher employed in any private educational institution shall be placed under suspension except when an inquiry into the gross misconduct of such teacher is contemplated. Section 3(3)(b) further provided that no such suspension shall remain in force for more than a period of two months and if the inquiry is not completed within that period the teacher shall, without prejudice to the inquiry, be deemed to have been restored as a teacher. However, this period could be extended further by two months by the competent authority if inquiry could not be completed within the initial period for reason directly attributable to the teacher.

Court observed that this provision is regulatory in character since it neither denies the management its inherent disciplinary power nor does it places unreasonable restriction on its power.

Same pace was maintained by the Supreme Court in *Frank Anthony School case.* Facts of the case may be noted in order to appreciate the decision of the court in its correct perspective. Frank Anthony is a minority educational institution which is recognized but unaided. Chapter IV of the Delhi School Education Act consists of section 8 to 12 dealing with "Terms and Conditions of Service of Employee of recognized private schools". These provisions aim at giving security of service to the teachers in these schools. Section 8 provides a check on the disciplinary powers of the management of these schools.

1.8(2) provided for a previous approval of the Director of Education in case of dismissal, removal, reduction in rank or other termination of an employee.

2.8(3) gives right of appeal against the order of dismissal, removal or reduction in rank to a tribunal consisting of a person who has held the office as a District Judge or any equivalent judicial office.

3.8(4) deals with the prior approval of the Director in case of suspension of an employee except in case of gross misconduct in which case suspension shall remain in force for not more than 15 days unless approved by the Director.

4.8(5) authorises the Director to accord his approval to suspension of an employee if he is satisfied that there are adequate and reasonable grounds for such suspension.

However, section 12 of the Act made these protective measures against disciplinary action inapplicable to minority institution. Hence, writ against the state by the Employees' Association of the school.

Except Section 8(2) court held that all the provisions of section 8 can be validly applied to the minority institutions and do not violate their protection guaranteed under Art.30(1).

Court found section 8(3) giving right of appeal in case of dismissal, removal or reduction in rank to a one man tribunal consisting of no less a person than the rank of District Judge as perfectly reasonable keeping in view the limited nature of right (in case dismissal, removal or reduction in rank), character of the appellate authority constituted and the manner of the exercise of the power. The court differentiated this case from *St.Xaviers College Society case*[84] on the ground that in that case constitution of the tribunal was at the discretion of the Vice-Chancellor and tribunal had been given blanket power to entertain appeal in every dispute, hence violated the minority right under Art.30(1) on the ground of unreasonable exercise of regulatory power. Similarly the court on similar ground, differentiated it from the case of *Rev. Mother Provincial*[85] where it considered the provision for an appeal to the Syndicate as objectionable.

Court further held the provisions of section 8(4) and (5) regarding prior approval in case of suspension as reasonable and sound exercise of disciplinary power. Court observed that these provisions do not confer a blanket power on the Director to grant or withhold prior approval. He is bound to accord approval if there are adequate and reasonable grounds for suspension. Furthermore, the power of the administration to take immediate action of suspension in case of gross violation of discipline remains untouched. Thus, Supreme Court concluded that these provisions do not violate minority rights under Art.30(1). Same view was upheld in *Mrs.Y.Theclamma v. Union of India* also.[86]

Nevertheless, court held that section 8(2) requiring prior approval of the Director for termination of service of an employee as unconstitutional and violative of Art.30(1) as it gives wide and uncanalised powers to the Director to give or withhold his assent at will even without giving reasons for his action.

Thus holding a delicate balance between the demands of freedom of administration and the dictates of justice to the employees court upheld these restrictions on the disciplinary power of the administration as reasonable and in consonance with the rights of minorities to establish and administer educational institutions of their own choice guaranteed under Art.30(1).

Another pace-setting judgement of the Supreme Court regarding disciplinary power of the minority institutions is *C.M.C. Hospital Employees' Union v. C.M.C.Vellore Association.*[87] Christian Medical College, Vellore is a minority educational institution. Management had terminated the services of three of its employees on proved charges and hence dispute between the management and the Employees' Union. This dispute was referred by the government to Industrial Tribunal under section 11-A of the Industrial Dispute Act, 1947. It may be pointed out that Hospitals are considered "industry" for the purpose of Industrial Dispute Act.

Industrial Dispute Act is a social security measure to ensure welfare of labour. The Act provides for the machinery for collective bargaining. The object of industrial adjudication has been a countervailing force to counteract the inequalities of bargaining power which is inherent in employment relationship.

The decision of the government to refer the dispute to industrial tribunal for adjudication was challenged by the college on the ground that it violates the minority right under Art.30(1). Upholding the contention of the college, High Court quashed the reference.

Being aggrieved by the decision Employees' Union came to the Supreme Court in appeal. Supreme Court reversed the decision of High Court. Main question in appeal was whether the relevant provisions of the Industrial Dispute Act are applicable to educational institutions established and administered by minorities which are protected by Art.30(1) of the Constitution. After discussing the matter at a great length, Supreme Court came to the conclusion that social welfare legislations and similar regulatory measures, though have some effect on the right under

Art. 30(1) do not constitute an abridgement of such a right. Court further observed that powers of Industrial Tribunal/Labour Court under the Industrial Dispute Act are not uncanalised, unguided and unlimited. Hence, it cannot be said that they will arbitrarily interfere with the disciplinary powers of the management and would violate the protection of Art.30(1).

In this hypersensitive area the court is trying to reconcile the minority rights under Art. 30(1) with the social necessity to protect an employee against vindictiveness though at times tilting the balance in favour of later on the ground of his weak bargaining capacity. However, some educationists feel that these protective measures, at times, become counter-productive and make educational institutions a den of indiscipline. They claim that these progressive measures of the court have put the education system on its head. Every one knows that truth lies somewhere between these two extreme views.

Political Elections

Another problem closely connected with discipline is the right of teachers in minority institutions to contest political elections. Many University statutes give this right to teachers. Put in other words this right has been snatched by teachers themselves on the plea that educated class must involve itself actively in the political process of the country. Therefore, statutes generally provide that a teacher may contest elections and if elected will be granted leave without pay for the period of his absence. No matter purpose behind this is laudable but it is a fact that this brings a lot of politics on the campus and destroys the academic environment. Hence, courts have held that such a provision cannot be extended to a minority institution against its will without violating its right to administer the institution under Art.30(1).

It clearly appears from the discussion that there is a plethora of case law relating to minority educational rights. As the approach the courts has been variegated, it not easy to draw final conclusion on each aspect of minority right under Art.30 of the Constitution. Nevertheless a Division Bench of the Supreme Court in *St.John's T.T.I* v. *State of T.N.* (1993)[88] has identified following broad principles from the plethora of case law.

1. The fundamental right declared by Art.30(1) of the Constitution is absolute in terms, but subject to regulatory measures;
2. There is no fundamental right under Art.19(1)(g) of the Constitution to establish or administer an educational institutions, if recognition is sought therefor;
3. There is no fundamental right to recognition, and any institution seeking recognition should abide by the regulations prescribed by the state as condition therefor;
4. The educational institution must be an institution of the minorities in truth and reality and not mere masked phantom;
5. The minority institution must be fully equipped with educational excellence to keep pace with other institutions of the state;
6. The regulation framed by the state cannot abridge the fundamental right of the minorities and they should be in the interest of minority institutions themselves and not based on state necessity or general societal necessities;
7. The regulation should be with a view of promoting excellence of educational standard and ensuring security of services of teachers and other employees of the institution and in the true interests of efficiency of institutions, discipline, health, sanitation, morality, public order and the like;
8. Even unaided institutions are not immune from the operations of the general laws of the land such as Contract law, Tax measures, Economic laws, Social Welfare legislations, Labour and Industrial laws and similar other laws which are intended to meet the need of the society.

Relevancy of Minority Educational Rights

After developing and elaborating the law relating to constitutional educational rights of religious and linguistic minorities to establish and administer educational institutions of their own choice, a legitimate question arises relating to relevancy of these rights in the present day context. I sincerely feel that the field of relevancy legitimately belongs not to a law person but to the social scientists, educationists and administrators of education.

"Relevancy" is a relative concept and therefore, can be discussed only against socio-economic and political backdrop of the society. Indian society has been described as a "compartmental society" within which a vast number of groups based on race, caste, religion, language, script and culture maintain distinct and diverse identities. No matter these compartments are not watertight but can be easily identified. The system by which these groups are related and mutually accommodated is so complex as to defy general description. Furthermore, Indian society is a economically developing society which has set democracy, socio-economic justice and secularism as its national aims. It is against this backdrop that the question of relevancy may be answered.

Minority educational rights under Art.30(1) are based on religion or language, therefore, in the present day context there is bound to be a reaction against any special treatment to any body or group on the basis of religion or language alone. Fact remains that any classification based on religion or language immediately becomes suspect. It becomes clear from the fact that graph of state regulation of these institutions is steadily rising and that of judicial response is steadily falling. Until the beginning of seventies state regulation was limited and judicial response was positive. It is curious to note that until that period not a single case was lost by the minorities in the Supreme Court. However, now the trend is fast changing. One of the reasons, besides ideological, may be dependence of minority institutions on state funding. It is natural that state funding is counter-balanced by more social control. Another reason may be a general trend in every progressive society towards constitutionalization of private rights.

Societal response towards minority educational rights has also since been changed. According to one school of thought Art. 30 is considered to be a most unsecular provision in a secular constitution.

Consideration of "relevance" brings us face to face with the fundamental question that what results constitutional minority educational rights have produced and at what costs? Tabulation of costs and benefits of these rights, in my opinion, clearly suggests that in the present day context costs out-weight benefits.

Among the benefits one may include the legitimate concerns of high quality and value education for society in general and minority community in particular, which can be better served if such educational institutions are left free to manage their own affairs, even though this cannot be assumed without exception.

However, among the costs one can count: (1) growth of minoritism; (2) alienation; (3) religious and cultural bias; (4) reverse discrimination; and (5) overt hostility and the like. These factors would negativate the very design and purpose for which minority educational institutions are established and would, in the long run, impinge with due force on the community itself.

In the present day context no minority can survive on any special privilege based on religion or language. A minority can carve out a due place for itself only by its constructive contributions to the society. Therefore, the advice of the Supreme Court in this behalf is highly instructive and is a writing on the wall which can be ignored only at a great peril. Court advised:

> The best institution will reveal no trace or colour of minority. A minority institution should shine in exemplary elecism in administration of the institution.

This advice unmistakably points towards crucial national goal of a secular society. Secularism in this setting implies something more than religious freedom, autonomy for religious groups, absence of state sanction for religious norms and separation of religion and state. It refers to the minimization of religion and religious groups as categories of public policy and as actors in public life. In this context I find the advice more congenial in practice and theory. Minority institutions can better adjust and can make their real positive impact on the community and society by being "true educational" institutions rather than 'minority' institutions.

It is gratifying that minority educational institutions are considered to be the best institutions in India and occupy a place of pride in the Indian society. Admissions in these institutions is still considered prestigious and the identity which these institutions provide to a person is proudly carried by him throughout his life. Besides serving the society these institutions play a significant role in the growth and development of the community also. Such institutions need not reveal any trace or colour of minority.

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